Nos. 95-1649, 95-9075

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

LEROY HENDRICKS,

Cross-Petitioner,

v.

STATE OF KANSAS,

Cross-Respondent.

On Writ Of Certiorari
To The Supreme Court of The State Of Kansas

JOINT APPENDIX
Volume I pp. 1-291

THOMAS J. WEILERT
Attorney at Law
Counsel of Record
250 N. Water, Suite 215
P.O. Box 1080
Wichita, Kansas 67201-1080
(316) 263-9323
Counsel for Respondent/
Cross-Petitioner

CARLA J. STOVALL
Attorney General of Kansas
Counsel of Record
301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(913) 296-2215

STEPHEN R. MCALLISTER
Special Assistant Attorney General
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550
Counsel for Petitioner/
Cross-Respondent

Petition For Certiorari Filed April 22, 1996
Conditional Cross-Petition Filed May 13, 1996
Certiorari Granted June 17, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

294 pp

JOINT APPENDIX MATERIAL

***State v. Hendricks*, No. 95-1649**
***Hendricks v. State*, No. 95-9075**

Relevant Docket Entries..... 1

Petition: *State v. Hendricks* (8/17/94) 4

District Court's oral ruling on motion to dismiss and reserving ruling on constitutional issues (Transcript of Proceedings of 8/19/94)..... 9

Testimony of Dan Crask (specialist clinical social worker) in probable cause hearing (Transcript of Proceedings of 8/19/94) 11

Journal Entry denying motion to dismiss petition and finding probable cause (8/19/94)..... 32

Memorandum and Order conditionally ruling that matter is civil proceeding, not criminal (9/13/94) 36

Letter from District Court to counsel clarifying that order was conditional (9/15/94)..... 44

Transcript of Proceedings of September 16, 1994:

A. Terry E. Davis..... 45

B. William Cummings..... 96

District Court's oral final ruling that proceeding is civil not criminal (Transcript of Proceeding of 9/23/94) 120

Transcript of Proceedings of October 3-5, 1994 (jury trial):

A. Leroy Hendricks..... 125

B. Stella Carter..... 191

JOINT APPENDIX MATERIAL

State v. Hendricks, No. 95-1649
Hendricks v. State, No. 95-9075 – Continued

C. Rose Loux 194

D. Roger Morris 205

E. Ron Davenport 212

F. Lester Lee 218

G. Dr. Charles Befort 221

H. Dr. William Logan 291

I. Reading of Jury Verdict 357

Jury Instructions on sexual predators and mental abnormalities (10/6/94) 359

Verdict (10/6/94) 360

Journal Entry of Commitment (10/6/94) 361

Motion for new trial, testimony of John House (Transcript of Proceedings of October 20, 1994) ... 366

State habeas corpus proceeding under K.S.A. 60-1501 (Transcript of Proceedings of August 28, 1995) 389

A. Dr. Charles Befort 389

B. Janet McClellan 421

C. District Court's oral ruling denying relief 450

Selected Legislative History of the Kansas Sexually Violent Predator Act, 59-29a01 *et seq.* 456

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
081794	PETITION FILED
081794	MOTION FOR PROBABLE CAUSE HEARING BY DA
081794	NOT OF HRG AND ORDER FOR SERVICE, JAY GREENO APPOINTED, PC HRG 081994 AT 1330 P.M. S/CLARK
081994	REQUEST FOR JURY TRIAL BY FOULSTON, DA
082394	JOURNAL ENTRY DETERMING PROBABLE CAUSE, DELIVERING RESPONDEN INTO CUSTODY OF LSH, AND FOR EVALUATION S/CLARK
081994	MOTION TO DISMISS PETITION
081994	MOTION IN LIMINE
090294	REQUEST FOR PRODUCTION OF DOCUMENTS FILED BY STATE OF KANSAS BY JAMES E. PUNTCH, JR.
090294	CARD SHOWING M A SHILLING TOOK RECORD OF PROCEEDINGS ON 081994: DEFT SENT TO LARNED FOR EVALUATION
090894	LEROY V HENDRICKS RETURNED TO SEDGWICK COUNTY JAIL ON 090794 BY SO
090994	ISSUES FILED BY NOLA FOULSTON
090994	MOTION FOR AN ORDER COMPELLING DISCOVERY AND OTHER RELIEF FILED BY STATE OF KANSAS BY NOLA FOULSTON
090994	ORDER: S/BARBARA
091494	RESPONSE TO PETITIONER'S MOTION FOR AN ORDER COMPELLING DISCOVERY AND OTHER RELIEF AND RESPONDENT'S MOTION TO RECONDISDER [sic] COURT'S ORDER AND MEMORANDUM OPINION OF SEPTEMBER 13, 1994

091694	NOTICE OF SERICE OF RESPONSE TO RESPONDENT'S REQUESTS FOR DISCOVERY FILED BY NOLA FOULSTON DA
091994	ORDER FOR RELEASE OF MEDICAL INFORMATION S/BARBARA
092394	ISSUES FILED BY NOLA FOULSTON DA
092394	RESPONDENTS' JOINT MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS FILED BY LEROY HENDRICKS AND RICHRD BEAM
092394	RESPONDENTS' SUPPLEMENTAL BRIEF IN SUPPORT OF DETERMINING SENATE BILL 525 CRIMINAL IN NATURE FILED BY LEROY V HENDRICK AND RICHARD L BEAM
092394	ORDER TO TRANSPORT TO LARNED STATE HOSPITAL FOR AN EVALUATION AND RETURN TO SEDGWICK COUNTY JAIL AS EARLY AS POSSIBLE ON WEDNESDAY 092894 S/BARBARA
092394	ORDER FOR RELEASE OF MEDICAL RECORDS S/BARBARA
092794	ORDER FOR RELEASE OF MEDICAL RECORDS DEPT. OF MENTAL HEALTH S/CORRIGAN FOR BARBARA
092794	ORDER TO TRANSPORT RETD: P.S. 092494
092894	MOTION IN LIME FILED BY D.A.
092994	PROTECTIVE ORDER S/CORRIGAN FOR BARBARA
093094	ORDER FOR RELEASE OF MEDICAL INFORMATION (DEPARTMENT OF MENTAL HEALTH) S/CORRIGAN
093094	WAIVER OF JURY BY DA
093094	OBJECTION TO STATE'S ATTEMPTED WAIVER OF JURY AND DEMAND FOR JURY TRIAL FILED BY LEROY V HENDRICKS

100394	RESPONSE TO RESPONDENTSS' [sic] OBJECTION TO PETITIONERS' WAIVER OF JURY TRIAL AND DEMAND FOR JURY TRIAL FILED BY D.A.
093094	ORDER TO TRANSPORT FROM LARNED TO SEDGWICK COUNTY JAIL P. S. 092894 SHF
100594	ORDER APPOINTING COUNSEL: APPOINTMENT OF E. JAY GREENO S/CLARK
100794	RESPONDENT'S PROPOSED JURY INSTRUCTIONS
100794	STATE'S PROPOSED JURY INSTRUCTIONS
100794	JURY INSTRUCTIONS GIVEN BY GREGOR L WALLER DISTRICT JUDGE
100794	JURY PANEL
100794	VERDICT, 100694, 12 YES 0 NO, SIGNED BY ROBERT LUKENS PRESIDING JUROR
101794	MOTION TO DISMISS OR IN THE ALTERNATIVE A MOTION FOR NEW TRIAL FILED BY LEROY HENDRICKS
101894	WRITTEN NOTICE TO THE COURT OF CHANGE OF STATUS; DISCHARGED WHILE ON TEMPORARY VISIT TO SEDGICK COUNTY DISTRICT COURT
102194	JOURNAL ENTRY OF COMMITMENT OF SEXUALLY VIOLENT PREDATOR S/WALLER
102494	LEROY HENRICKS TRANSPORTED TO LARNED STATE HOSPITAL 102194
110794	NOTICE OF APPEAL FILED BY LEROY V HENDRICKS
100794	CONFIDENTIAL EVÁL & LETTER FROM LARNED ST. HOSPITAL, MICRO-F CONF. AND STORED IN CONF. FILE CABINET.

PETITION: *STATE V. HENDRICKS* (8/17/94)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Leroy V. Hendricks, Respondent	CASE NO. 94P 964 (Filed Aug. 17, 1994)

PURSUANT TO KANSAS STATUTES ANNOTATED 59-29(a)01 et seq. (1994 SESSION LAWS)
An Act concerning person who commit sexually violent offenses.

PETITION

COMES NOW Petitioner, State of Kansas, by and through its attorney, NOLA FOULSTON, District Attorney for the Eighteenth Judicial District, and for its cause of action herein alleges and states as follows:

1. Petitioner Nola Foulston is the duly elected, qualified and acting District Attorney for the Eighteenth Judicial District, Sedgwick County, Kansas.

2. Respondent, Leroy V. Hendricks, whose present address is Hutchinson Correctional Facility, Hutchinson, Kansas, is presently confined in the custody of the Kansas Department of Corrections.

3. This action is brought pursuant to Kansas Statutes Annotated 59-29(a)01 et seq. (1994 Legislative Session Senate Bill 525), an act concerning persons who commit sexually violent offenses.

4. By written notice received on the 6th day of July, 1994, within forty-five days of the filing of this petition, Kansas Department of Corrections, the agency with jurisdiction, has certified that respondent, Leroy V. Hendricks, may meet the criteria of **a sexually violent predator** as defined by statute, to wit:

(a) That on the 26th day of November, 1984 respondent Leroy V. Hendricks was convicted in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Case No. **84CR 1463** of a sexually violent offenses involving two victims as defined by law, to wit: **K.S.A. 21-3503 Indecent Liberties with a Child; and K.S.A. 21-3503 Indecent Liberties with a Child; and has a history of prior sexual offenses from other jurisdictions, to wit: 1960 Spokane, Washington, Indecent Liberties with a Child; Seattle, Washington (1963 and 1967) Indecent Liberties with a Child (two separate cases).**

(b) That Respondent is anticipated to be released from total confinement on the 11th day of September, 1994.

(c) That sufficient evidence exists to determine that respondent suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

WHEREFORE, petitioner requests that respondent be taken into custody by the Sheriff of Sedgwick County and

transferred to an appropriate facility; that the court set a hearing date not later than 5:00 p.m. of the second full day the District Court is open for the transaction of business after the filing of this petition to determine whether probable cause exists to believe that respondent is a sexually violent predator; that counsel be appointed for respondent; that if probable cause is shown, that respondent remain in custody and be transferred to an appropriate facility for evaluation as to whether he is a sexually violent predator; and if such finding is made, for a trial by jury on the issues; and if found to be a sexually violent predator beyond a reasonable doubt, that respondent be committed to the custody of the Department of Social and Rehabilitation Services in a secure facility for control, care and treatment until such time as his mental abnormality or personality disorder has so changed that he is safe to be at large; for evaluation and costs of this action to be paid by the Department of Social and Rehabilitation Services; and, for such other and further relief as the court deems just and proper.

/s/ Nola Foulston
PETITIONER

STATE OF KANSAS)
) **SS:**
COUNTY OF SEDGWICK)

Petitioner, of lawful age, being first duly sworn upon oath states that affiant is the petitioner above-named who has read the above and foregoing petition and who is familiar with the contents thereof, and that the statements

therein made are true and correct to the best of her knowledge and belief.

/s/ Nola Foulston
PETITIONER

SUBSCRIBED AND SWORN to before me this 17th day of August, 1994.

/s/ L. Jeanette Clary
Notary Public

L. JEANETTE CLARY
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 11-9-96

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Leroy V. Hendricks, Respondent	)	CASE NO. 94P 964 (Filed Aug. 17, 1994)

PURSUANT TO Kansas Statutes Annotated 59-29(a)01 et seq. (1994 Session Laws)
An Act concerning person who commit sexually violent offenses.

MOTION FOR PROBABLE CAUSE HEARING

COMES NOW petitioner, State of Kansas, by and through its attorney, Nola Foulston, District Attorney for the Eighteenth Judicial District and respectfully moves the court, pursuant to K.S.A. 59-29(a)01 et seq. for a probable cause hearing on the determination as to whether respondent is a sexually violent predator; and for appointment of counsel to represent respondent in this action.

Petitioner requests that the probable cause hearing be scheduled not later than 5:00 p.m. of the second full day the District Court is open for the transaction of business after the filing of this petition on the 17th day of August, 1994 to determine whether probable cause exists.

Respectfully submitted,

/s/ Nola Foulston
Nola Foulston, District Attorney
Attorney for Petitioner
Supreme Court Number 09175

DISTRICT COURT'S ORAL RULING ON MOTION TO DISMISS AND RESERVING RULING ON CONSTITUTIONAL ISSUES (TRANSCRIPT OF PROCEEDINGS OF 8/19/94)

* * *

[p. 10] THE COURT: First of the all, on the matter raised as to the sufficiency of the petition, it appears to me that under what I'll call the act – and when I'm referring to the act, I'm referring to Chapter 316 of the 1994 Session Laws. And under the act it would appear that the allegation found in the petition filed in the instant case in paragraph 4, alleging a violation in the case that was numbered 84 CR 1463 in this judicial district, is sufficient as that is a specific reference found in Section 2 of the act, in particular at (e)(2) where it says, "indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto." That makes the petition sufficient in my mind bringing it specifically – to bring this matter specifically within the act.

As to service, I'm going to find that the service upon Mr. Hendricks today, coupled with the service on his lawyer on Wednesday last past, is sufficient service. I'm finding his motions are not premature, since he's liable to be subject to the act and is indeed subject to it but under the provisions of it might be deprived of his [p. 11] liberty.

As to the constitutional issues – and they were set out very well by Mr. Weilert in the particulars – I'll reserve any opinion as to the constitutional issues of the act itself and parts thereof.

As to whether or not the State of Kansas is bound by its contract originally entered, interesting argument. No question at all about the State of Kansas being bound by contracts it enters into. In this particular case, can the Legislature then come along and mandate an action by the D.A. which is contrary to that that's been established by law? I'm going to reserve ruling on it and give the District Attorney time to talk about it in a brief or have whatever the lawyers wish to do in that regard done.

I'll allow the State to proceed and see if they can present evidence here that would show probable cause to believe that Mr. Hendricks is under the act and that he ought to be examined so that a jury or a judge can make a ruling or a finding of their own.

Preliminary matters. Mr. Weilert, did you want to make an opening statement?

MR. WEILERT: No, Your Honor.

THE COURT: Call your first witness, please.

MS. BARNETT: State calls Harvey Russell to the stand.

* * *

TESTIMONY OF DAN CRASK
(SPECIALIST CLINICAL SOCIAL WORKER)
IN PROBABLE CAUSE HEARING
(TRANSCRIPT OF PROCEEDINGS OF 8/19/94)

* * *

[p. 25] MR. WEILERT: State's offering it, Your Honor.

THE COURT: Did you want to puruse it?

MR. WEILERT: Yeah, please.

THE COURT: Okay, why don't you make cursory examination. If you think you need more time, tell me and we'll take a little recess so you can at least make a preliminary examination. I don't want to hurry you.

MR. WEILERT: I don't have any further need of the file, Your Honor.

THE COURT: Thank you very much sir. Just take your file. Thank you for your evidence. Call your next witness, Ms. Barnett.

MS. BARNETT: Your Honor, the State calls Dan Crask to the stand.

THE COURT: Mr. Crask, come right up here, please, sir. This lady will administrator an oath to you.

DAN R. CRASK,

called as a witness on behalf of the State, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. Please state your name for the Court.

A. It's Dan Crask.

Q. What is your occupation?

A. I'm a licensed specialist clinical social worker.

[p. 26] Q. What does that mean?

A. I've been granted a license by the State of Kansas to practice clinical social work in this state.

Q. What does it mean to practice clinical social work?

A. I assess, diagnose and treat individuals with a variety of adjustments and mental and personality disorders.

Q. What type of formal education have you had to prepare you to do that?

A. I received a Bachelor's in Social Work from Tabor College in 1982. I received a Master's in Clinical Social Work from the University of Kansas in 1989, and I received – after I received my master's, I did a two-year supervision period and took a test and passed a test to obtain my license for specialist clinical social work status.

Q. And within that type of education that you received, did you specialize in any particular area or is that just kind of a broad area that you studied in?

A. It's rather broad.

Q. Now, since you received your formal education have you had – received any training or seminars, things of that nature?

A. Yes, I have.

Q. And what would those be?

A. I have received many seminars. Some of them include – I attended a conference in March of 1994 on treating sexual [p. 27] abusers here in Wichita put on by Tim Kahn out of the State of Washington, approximately 12-hour conference; attended a conference – National Conference on Managing Abusive Sexuality in Chicago in 1991. I have attended Nicholas Groth's conference on working with sex offenders. I have attended Dennis Dailey's conference on working – on assessing sexual offenders and a variety of others.

Q. Have you yourself ever participated in training other people in the area of sexual assault or sexual abuse?

A. Yes, I have.

Q. How and where?

A. I – in 1991 I participated in a training for the sexual abuse treatment provider – approved list of treatment providers for Sedgwick County Mental Health and trained folks on – anyone who need – who wishes to be on that list has to attend trainings, and I presented at the training in 1991 for folks to become approved treatment providers for Sedgwick County Mental Health.

Q. Since receiving your degrees, what have you done as far as your profession or occupation?

A. Well, of course, I practice. When I was – when I first was employed with a master's, I worked at Family Consultation Service treating a variety of folks, concentrating mostly on sexual offenders and sexual abuse victims, children and adolescents. I've continued that [p. 28] work into my private practice. I currently conduct groups for sexual offenders. I conduct individual training for both adolescent sexual offenders and adult sexual offenders. I conduct individual and occasionally group sessions for sexual abuse victims. I'm involved with – in family sessions for those kinds of things. I'm also on the Board of the Wichita Area Sexual Assault Center. I am also active in the task force – a local task force for the sexual abuse – I think it's called the Sexual Abuse Treatment Task Force that is trying to devise standards for treatment and unify treatment practices for sexual offenders and sexual abuse victims also for the State of Kansas.

Q. Have you ever participated in the investigation of sexual assault cases?

A. Yes. I was also employed at the Exploited and Missing Children's Unit from 19 – from its inception, which I believe was 1985 or – '84 or '85 – I can't remember – until 1987, when I returned to graduate school, investigating cases of child sexual abuse. Also did some of that prior, worked for Child Protective Services prior to that for three years investigating child sexual abuse cases and some runaway cases in a variety of other child physical abuse cases and neglect cases.

Q. Now as a clinical social worker working with victims of [p. 29 sexual assaults or sex offenders, what is it that you do for them?

A. Try to assess their need for treatment and provide them with appropriate recovery and treatment from their trauma or mental disorder.

Q. And how do you assess their problems or their treatment needs?

A. A variety of things are included in assessments. Psychological testing is obviously included in assessment of sex offenders, and I read a variety of psychological tests that may be provided by other folks. Reports from victims is important in the assessment process, reports from the police department, perpetrator statements during those events. For sexual abuse victims, same, similar reports of the trauma that may have occurred to them, changes in functioning, all those kinds of things figure into the assessment as well as personal interviews with the folks.

Q. Now, as part of your assessment do you diagnose people or determine if they have a personality disorder or mental disorder of some type?

A. Yes.

Q. And do you do that in much the same way as you just described.

A. Yes.

[p. 30] Q. Now, you indicated that you look at psychological evaluations or testing. Do you yourself perform those?

A. No, I do not.

Q. But it is part of your job to actually look at the data that comes from that and then make an assessment based upon that data?

A. Very seldom do I make as assessment based on the testing data itself. I typically look at reports generated by the data from the practitioners who are generating reports and make an assessment and diagnostic criteria based on those reports but not necessarily on the data itself. I don't get scores and numbers on MMPIs and things like that.

Q. Okay. How many sex offenders would you say that you've worked with?

A. Several hundred. I don't know the exact number. I currently have probably twenty-five in treatment on an ongoing basis at this time.

Q. And that's sex offenders?

A. Sex offenders.

Q. Mr. Crask, I would like to ask you if you're familiar with records or if you've been provided some records on an individual by the name of Leroy V. Hendricks with a date of birth of 9-27 of '34?

A. Yes, I have.

Q. What records have you been provided?

[p. 31] A. With Mr. Hendricks I received a copy of a petition filed in this court, petition that we're here on currently. I received a Notification of County – to the County/District Attorney of convicted sexually violent

offense. I received an SRDC report that includes an Evaluation Summary, a Psychological Report, a Report of Clinical Evaluation dated February 28th, 1985. I received a report of a Psychiatric Evaluation by Leonel Urdaneta, M.D. I received a face sheet to the Presentence Snvestigation [sic] and – the subsequent investigation, I should say, and then I also have a copy of a – I have a second copy of the same material.

Q. Are you familiar with diagnostic criteria set out in the DSM-IV?

A. Yes, I am.

Q. What is the DSM-IV, for the record?

A. DSM-IV is the American Psychiatric Association's diagnostic manual for mental disorders.

Q. Would that include personality disorders?

A. Personality disorders and mental disorders, yes, and adjustment disorders and some family disorders. There's adjustment disorders and family V-code type information in it.

Q. In your opinion, based upon looking at the records under the name of Leroy V. Hendricks, do they indicate that that [p. 32] person meets the diagnostic criteria for any of the mental and/or personality disorders as defined by the DSM-IV-R?

MR. WEILERT: Your Honor, I object at this time. The prosecution is asking for an opinion from Mr. Crask, and he's already said that the only information he has basically is from 1985, and we're talking about a situation where we're asking an opinion about his – Mr.

Hendricks' condition today. If I may voir dire, I believe the witness will testify that's impossible.

THE COURT: I'll allow you to voir dire on the point of whether or not he's qualified to render an opinion.

MR. WEILERT: On that information?

THE COURT: On that information.

VOIR DIRE EXAMINATION

BY MR. WEILERT:

Q. Mr. Crask, you said that the reports you received are dated from 1985?

A. Correct.

Q. Is it – what you're telling us is that, based upon testing done nine and a half years ago, you can render an opinion on the condition of a person today?

A. On some diagnoses, yes.

Q. And what are those diagnoses?

A. Some of them would be antisocial personality – or [p. 33] personality disorders, which tend not to change over periods of time, and sexual disorders such as pedophilia.

Q. Sir, in your practice is it common for you to retest persons or have persons retested every six months to a year or two years?

A. Yes, it is.

Q. And why do you do that?

A. To update information as far as progress or to validate prior diagnoses.

Q. Well, doesn't that, in effect, mean that the information ages and is no longer as valid as it may have once been?

A. It can mean that under a variety of circumstances. Certainly other issues – a lot of issues can have growth or outgrowth. Certainly all the childhood disorders and things like that tend to have changes over periods of time. Some of the disorders do not tend to have as much change over a period of time.

Q. So you say don't have – tend to have as much change. They do change, don't they?

A. They potentially can.

Q. So you can't say here today whether or not the person whose records you have evaluated has changed or not, can you?

A. Due to the criteria of diagnosis that this person meets, I can give you a relatively assured response because of that [p. 34] diagnosis – that because of that diagnosis that he tends to fall under, that it will not have changed.

Q. You could not give us an opinion based upon a reasonable degree of medical or psychological certainty, though, can you?

A. Well, I believe that I can, yes, under – for this circumstance especially.

Q. Okay. You said that in – you have not conducted any personal interviews with this person, have you?

A. Correct.

Q. Isn't it correct that in the Diagnostic and Statistical Manual that you're referring to that it says in the diagnostic features relating to personality disorders that "Although a single interview with the person is sometimes sufficient for making the diagnosis, it is often necessary to conduct more than one interview and to space these over time."

A. Can you refer me to –

Q. Page 630 under "Diagnostic Features," the second paragraph, sir.

A. I am sorry, which paragraphs?

Q. Under the heading "Diagnostic Features."

A. I have that.

Q. The second paragraph, the 7th line, starting with "Although."

[p. 35] A. It does state that, yes.

Q. So doesn't a reasonable reading of that indicate that, in order to make the diagnosis under DSM-IV regarding personality disorders, a – at least one personal interview is required?

A. The entirety of that paragraph suggests that the diagnosis of the personality disorder requires an evaluation of the individual's long-term patterns of functioning. The particular personality features must be evident by

early adulthood. That requires information to be obtained, typically, through records, and the DSM-III-R or DSM-IV indicates that with antisocial personality disorder that you do need to get collaborating evidence to make that diagnosis.

Q. Doesn't it go on to say – and I have read it before – "Although a single interview with the person is sometimes sufficient for making the diagnosis, it is often necessary to conduct more than one interview and to space these over time"? Doesn't that indicate to you, sir, that a personal interview is necessary, at least one?

A. If I – if I were required to make a full diagnosis of this person, it would probably require that to be done.

Q. Sir, do you realize that what your testimony here today is doing is subjecting this person to a denial of his liberty?

[p. 36] MS. BARNETT: I'm going to object to the form of that question as argumentative, Your Honor.

THE COURT: I'll sustain.

BY MR. WEILERT:

Q. Do you realize, sir, that what you are being asked to do today is to tell the Court whether or not this person is a violent sexual predator?

A. No, that is not what I'm being asked to say.

Q. Okay. What do you think you're being asked to say?

A. I'm being asked to say whether or not this person's behavior characteristics fit within the criteria for a

diagnosis of pedophilia or antisocial disorder or some sort of mental disorder. I am not – and if there's reason to believe that that could be true. I am not trying to determine whether this person is a predator or should be put away for a period of time. I'm assuming there's an evaluation process that will determine that cause of action, not my testimony.

Q. Okay. In making your – or coming up with this opinion that you say you have, did you rely to any extent on the allegations in the petition regarding this person's prior criminal history?

A. Yes, to some extent.

Q. How much?

A. It is one of the – it is one of the factors that [p. 37] contributes to his diagnosis. I don't know how to differentiate if it's twenty percent of eighty percent.

Q. If those allegations of prior criminal history, prior criminal convictions were not accurate or were not proved, would that change your opinion?

A. No, it would not. It would not change my – it would not change the fact that he tends to meet criteria for a diagnosis of pedophilia, no.

MR. WEILERT: Your Honor, probably I'm getting beyond the point of the voir dire. I don't believe – Well, I have some more questions.

BY MR. WEILERT:

Q. Mr. Crask, do you accept the Diagnostic and Statistical Manual, Volume IV as an authoritative source regarding the diagnosis of mental disorders?

A. It's an authoritative guide to the diagnosis of mental disorder, yes.

Q. And would you agree that in order to – when you are rendering an opinion regarding Mr. Hendricks, you are, in fact, making a diagnosis?

A. I am – I am indicating that the behaviors that I have read and observed in the evaluations indicate a diagnosis, yes.

Q. In order to make a diagnosis under the Diagnostic and Statistical Manual, Volume IV, or revision IV, do you [p. 38] agree that it says a personal interview is required?

A. It does not say a personal interview is required. I will agree that it does say that a single interview is not – "Although a single interview with the person is sometimes sufficient for making the diagnosis, it is often necessary to conduct more than one interview. . . . "

MR. WEILERT: Your Honor, I don't have any other questions at this time. I would suggest to the Court that Mr. Crask is, however the semantics come out, making a diagnosis that Mr. Hendricks has a personality disorder or a mental abnormality and that he has done that based upon information which is stale and without the benefit of a personal interview. I would suggest that the language we have discussed from the Diagnostic and Statistical Manual indicates that a personal interview is necessary to make such a diagnosis and, therefore, his opinion should not be allowed, and it is without proper foundation.

THE COURT: Thank you. I'll overrule the objection as to foundation.

MS. BARNETT: Thank you, Your Honor.

DIRECT EXAMINATION (Resumed)

BY MS. BARNETT:

Q. Do you recall my question that I asked?

A. No, I don't.

Q. All right. In your opinion, do the records that you've [p. 39] reviewed with regard to Leroy V. Hendricks indicate that this person meets diagnostic criteria for an of the mental and/or personality disorders as defined in DSM-IV-R?

A. Yes.

Q. And what would that be?

A. Pedophilia.

Q. And why do you diagnose or why do you indicate that that would be the diagnostic criteria or the personality disorder that Leroy V. Hendricks fits into?

A. Criteria for a diagnosis of pedophilia states – has three primary areas: A, that the person has to have, over a period of at least six months, recurrent and intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children, general age 13 years or younger. He meets that criteria according to the information contained in the reports I have read. B, the fantasies, sexual urges or

behaviors cause clinically significant distress or impairment in social, occupation or other important areas of functioning. His incarceration meets that requirement. And, C, the person is at least 16 years of age and at least five years older than the child or children in Criterion A. So he meets the criteria according to the information contained in the information that I read.

[p. 40] Q. In reviewing that information which you have outlined for us, is it your impression from – that someone who has drafted those documents had a person-to-person interview with a Leroy Hendricks?

A. No. I am sorry. Which, the criteria?

Q. No, no. I'm talking about the reports that you reviewed.

A. Yes.

Q. Is it your impression that whoever drafted those reports, that they did so upon an interview with Leroy Hendricks?

A. Yes.

Q. Have you worked with people who you diagnosed or assessed as being pedophiles?

A. Yes.

Q. And do people, in your opinion, who are assessed as being pedophiles or suffering from pedophilia pose a risk to the community?

A. Yes.

Q. In what way?

A. Pedophilia is a act that, through research, we know has a certain amount of recidivism to it. People with sexual orientation, sexual arousal on children tend to act on that over periods of time. They may stop that behavior occasionally after incarcerations and so forth, but they tend to repeat that behavior over time.

Q. Why is that?

[p. 41] A. Sexual – deviant sexual arousal types of things like pedophilia tend to be somewhat gratifying for folks, and it has an internal mechanism, reinforcement mechanism where if they act on a sexual event or they have sexual fantasies about an event, they receive some sort of stimuli from that, and it tends to reinforce itself just on a behavioral-type level.

Q. Now, I believe that you've gone through this a little bit in the voir dire portion of your examination, but let me just ask you. Does the age of this information in any way affect your belief or your opinion that this person fits into the personality disorder of pedophilia?

A. The age of this information does not impact – does not make me feel that he would not fit into that, no.

Q. What if hypothetically I were to say that the person that you see outlined in those reports under the name of Leroy V. Hendricks has served a significant period of time in a penal institution incarcerated without receiving any type of treatment or therapy for sex offenders in this area. How would that affect your opinion with regard to whether a person has gotten over this personality disorder?

A. It would be my opinion that that person would be likely to continue with a diagnosis of pedophilia actually regardless of whether he had treatment or didn't have treatment.

[p. 42] Q. All right. And sticking with that same hypothetical situation, what would your opinion be about the risk of that person if they were to be released into society?

A. A person who did not have treatment is certainly at a much higher risk to reoffend than a person who does have treatment.

MS. BARNETT: May I have just a moment, please, Your Honor?

THE COURT: Yes.

MS. BARNETT: Thank you. Your Honor, I have no further questions at this time.

THE COURT: Thank you. Cross-examination, Mr. Weilert.

MR. WEILERT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WEILERT:

Q. Mr. Crask, are you calling pedophilia a personality disorder?

A. No, I'm not.

Q. Okay. But Ms. Barnett in her questioning asked you about personality disorders, and you said pedophilia; is that not correct?

A. It's not my interpretation of the questioning that was asked to my – or that I answered.

Q. Okay. So pedophilia is not a personality disorder, is it?

[p. 43] A. Pedophilia is a mental disorder.

Q. Not a personality disorder?

A. Correct.

Q. Okay. Now, in the field of social work or psychology, is there such a thing as a – let me get the words right here – mental abnormality?

A. I suppose that word is used in a variety of different ways.

Q. What does mental abnormality mean to you as a licensed specialized clinical social worker?

A. I would have to know the usage of the word in a context, I believe.

Q. So it has no meaning, as far as you're concerned from a professional standpoint, no specific –

A. Well, it can have meaning but I'm – in and of itself –

Q. You can't tell the judge what mental abnormality means, can you?

A. No. I couldn't

Q. In reaching your opinion that the person referred to in this report is a pedophilia – or pedophile, you said that be meets the criteria set out in the Diagnostic and Statistical Manual, and that's on page 528.

A. And that's why I would say that this person suffers from a pedophilia – a sexual disorder of pedophilia, not that he is necessarily a pedophile.

[p. 44] Q. But the criteria you used, are those set out on page 528 of the manual?

A. Yes, they are.

Q. Other than the information contained in the petition and – pardon me, I'm talking about under subsection A, that criterion. Other than the information contained in the criteria – pardon me, in the petition, what information did you have that allows you to say that this person referred to in this report meets Criterion A?

A. Okay. There's several pieces. In the psychological report, the reporter indicates that Mr. Hendricks stated or realized that his sexual preference is for young boys and girls and that it is illegal to act on those impulses. He has tried to be discreet, choosing children he did not know and where he would not be seen.

Q. Okay. And that is a report – just so I'm getting it right, that's something that Mr. Hendricks allegedly told a –

A. Marta Howe, a psychologist. In February of 1985, she reported this information.

Q. '85?

A. Correct. There are other things. It is noted in this report that the inmate discussed his maladaptive sexual involvement with young children with absolutely no remorse, implying that the children have enjoyed it or

[p. 45] invited his involvement and that no negative consequences would be suffered.

Q. Once again, that's from that same report dated back in 1985, and it's statements related about this person named Leroy Hendricks?

A. She is – in this report, psychological report, she is talking about – is reporting about the assessment she made of Mr. Hendricks from a conversation with Mr. Hendricks.

Q. Okay.

A. She said that the inmate acknowledged he had been convicted previously in the State of Washington. Again, the record is reported – in a Report of Clinical Evaluation, the record reports in 1956 a charge of indecent exposure; in '59, a charge of lewd conduct. First felony for indecent liberties was in Washington. In 1963, he received a similar charge. The 20-year sentence was suspended, and he was committed to Western State Hospital, this in Washington.

Q. It is correct that that, once again, is information reported by this person named Leroy Hendricks to a psychologist or psychiatrist?

A. Correct.

Q. Okay.

A. Psychiatric Evaluation where Mr. Hendricks also reported [p. 46] information to a psychologist named Leonel Urdaneta. I'm not sure – U-r-d-a-n-e-t-a, Supervising Psychiatrist at SRDC.

Q. And that's generally the same information, is it not? And, once again, it's based upon –

A. It's based on his reporting to those people that he has sexual fantasies and has acted out sexually on children, yes. Those are the types of things that I took into consideration in this diagnosis, as well as convictions.

Q. So the information or a good deal of the information you used in reaching your diagnosis and opinion was based upon what Leroy Hendricks had told to other health care providers, is it not?

A. Correct.

MR. WEILERT: Your Honor, at this point I would move that Mr. Crask's opinion be stricken based upon a violation of the physician-patient privilege. The information given by Mr. Hendricks to those persons was privileged. He was not waived the privilege and, therefore, it cannot be used in a civil proceeding, which the State so vehemently says this is, unless it is regarding care and treatment for injuries for which the plaintiff is seeking damages, and it's simply all inadmissible. His opinion is based upon it, and his opinion should be stricken.

* * *

JOURNAL ENTRY DENYING MOTION TO DISMISS PETITION AND FINDING PROBABLE CAUSE (8/19/94)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Leroy V. Hendricks	)	CASE NO. 94 P 964
Respondent	)	

PURSUANT TO KANSAS STATUTES ANNOTATED 59-29(a)01 et.seq. (1994 SESSION LAWS)
An Act concerning persons who commit sexually violent offenses.

JOURNAL ENTRY

NOW ON THIS 19h [sic] day of August, 1994, this matter comes before the court pursuant to **K.S.A. 1994 Session Laws 59-29(a) 01 et. seq. (The Sexual Predator Act)** upon the petition and motion filed by petitioner alleging respondent to be a sexually violent predator as defined by law and for a finding of probable cause that respondent should be taken into custody, transferred to an appropriate treatment facility and evaluated by a qualified professional. The State of Kansas appears by and through its attorneys, Nola Foulston, District Attorney for the Eighteenth Judicial District and Debra Barnett, Assistant District Attorney. Respondent, Leroy V. Hendrick, appears in person and with his counsel, Thomas J. Weilert for E. Jay Greeno. There are no other appearances.

WHEREUPON, counsel for respondent moves the court for an order of dismissal of the petition, and submits a brief in support thereof. Further, counsel for respondent moves the court, in limine, for certain other orders. The court, being fully and duly advised in the premises finds as follows: Under the Sexual Predator Act, the peition [sic] filed by petitioner is sufficient to allege a cause of action as required by statute. Further, the court finds that respondent has been served and that counsel for respondent has also personally been served with certified copies of all documents on the 17th day of September, 1994 upon their filing with the court. The court further finds that respondent's motions are not premature, however, the court reserves ruling of the issue of constitutionality of the Sexual Predator Act and upon respondent's assertion that the State is estopped from proceeding under the Sexual Predator Act by virute [sic] of prior plea negotiations entered in the criminal case filed against respondent, to wit: 84 CR 1463. The Court does not rule upon petitioner's request that the proceedings be closed to the public and confidential.

WHEREUPON, petitioner presents evidence in support of its petition and motion. Upon motion of petitioner, the Court, after being fully and duly advised in the premises, takes judicial notice of the files of the District Court for the Eighteenth Judicial District, particularly, the action entitled **State of Kansas v. Leroy V. Hendricks, 84CR 1463** respondent herein. The petitioner rests. The respondent does not present evidence.

WHEREUPON, the Court, after having reviewed the official court file and its contents, after hearing the evidence, statements and arguments of counsel, and otherwise being fully and duly advised in the premises finds that probable cause exists to believe that respondent, Leroy V. Hendricks, the person named in the petition, is a sexually violent predator as defined by **K.S.A. 1994 Session Laws 59-29(a) 01 et. seq.** The court further finds that the respondent shall be taken into the custody of the Sheriff of Sedgwick County, and delivered to the custody of the Larned State Security Hospital, Larned, Kansas, an appropriate facility, for an evaluation by a professionally qualified person, to determine if the respondent is a sexually violent predator. A report of such evaluation shall be delivered to the court on or before September 19, 1994.

IT IS THE FURTHER ORDER OF THE COURT that respondent shall have appointed expert or professional persons to perform an examination on his behalf and that Larned State Hospital shall cooperate in making respondent available for this purpose at a location agreed upon by counsel or further ordered by the Court.

IT IS BY THE COURT SO ORDERED.

/s/ Paul W. Clark
PAUL W. CLARK
JUDGE OF THE
DISTRICT COURT

APPROVED BY:

/s/ Nola Foulston
NOLA FOULSTON,
#09175
District Attorney

/s/ Debra Barnett
DEBRA BARNETT,
#12729
Assistant District
Attorney

/s/ Thomas J. Weilert
THOMAS J. WEILERT
#08626
Attorney for -
Respondent

MEMORANDUM AND ORDER CONDITIONALLY RULING THAT MATTER IS CIVIL PROCEEDING, NOT CRIMINAL (9/13/94)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF Richard L. Beam, Respondent;	Case No. 94 P 963
IN THE MATTER OF THE CARE AND TREATMENT OF LeRoy V. Hendricks, Respondent;	Case No. 94 P 964

PURSUANT TO Kansas Statutes Annotated 59-29(a)01 et. seq. (1994 Session Laws)
An Act concerning persons who commit sexually violent offenses.

ORDER and MEMORANDUM OPINION

This court has before it at the present time the very limited issue – Is K.S.A. 59-29(a)01 et seq. enacted in the 1994 legislative session, a criminal or civil proceeding?

The state contends that it is a civil commitment proceeding and the Respondents contend it is a criminal proceeding. The resolution of this issue will control over discovery procedures, including, but not limited to, requests for admissions, interrogatories, production and disclosure of relevant documents and witnesses, including expert witnesses. In addition, the matter of expert fees and costs of examination of the person as well as

attorney fees for counsel representing these persons, need to be addressed as to which governmental agency will be obligated to pay for these – the county if civil or the state if criminal?

Counsel have presented their respective briefs. After reviewing the same and other consideration of this issue, the court finds that the Act is a civil commitment proceeding.

In determining whether a statute is categorized as civil or criminal in nature, the court looks to the language of the statute and legislative history analyzing the purpose and effect of the statutory scheme. *Allen v. Illinois*, 478 U.S. 364, 368, 106 S.Ct. 2988, 291, 92 L.Ed. 2d 296 (1986). In *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed. 2d 742 (1980), the Court adopted a two-part analysis:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. (248-49)

As the court did in *In re Young*, 857 P.2d 989 (Wash. 1993), it looked first to the language of the statute and the legislative history, then turn to an analysis of the purpose and effect of the statutory scheme. Washington enacted the Community Protection Act of 1990. Part X of the Act (REW 71.09) is entitled "Civil Commitment." Those defendants who are determined to be "sexually violent

predators" can be involuntarily committed after they have served their sentences. It is suffice to state that this statute is comparable to K.S.A. 59-29(a)01.

1. Language of the Statute and Legislative History.

The title refers to "An act concerning persons who commit sexually violent offenses; relating to such person's civil commitment; evaluation, care and treatment; allegation of sexual motivation in criminal cases." Section 1 sets out legislative intent and history and concludes with the statement ". . . . therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature."

The procedural provisions set out in Section 4, 5 and 6 are similar to a civil involuntary commitment under K.S.A. 59-2908 et seq. although persons under this Act have the right to a 12-person jury rather than six and a finding beyond a reasonable doubt rather than clear and convincing proof.

Section 7 provides that upon a determination by court or jury, that the person is a sexually violent predator, that person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. It further provides that such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services and shall be kept in a secure facility and such persons shall be segregated at all times from

any other patient under the department's services. Commencing in June 1, 1995, these persons committed under this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary.

Section 8 provides for annual examination of the person's mental condition with a right to assistance of qualified professional persons, a right to petition the court for discharge, a right to counsel, a right to be released if there is a determination by the secretary that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released (Section 10).

2. Purpose and Effect of the Act

If the Act is punitive either in purpose or effect then the state's categorization that the statute is civil in nature would not be controlling. Here the focus is on treatment not punishment nor on criminal culpability of past actions. The Department of Corrections plays no role in the care and custody of the person in the statutory scheme. The court has been informed that at the present time, the two persons involved in these proceedings are confined at the Security Behavior Ward of Larned State Hospital – the Jung Building, under security of a guard. Their confinement is based upon a finding by the Honorable Paul Clark, district judge that there is probable cause to believe that these persons are sexual violent predators and that they be taken into custody and transferred to an appropriate facility for the evaluation. (Section 4) The court assumes that this place of detention is temporary, as

Section 7(b) provides for a more permanent facility. This fact, standing alone, will not constitute such punishment as to negate the civil nature of this act.

Allen, supra, held that an Illinois statute providing for civil commitment of sexually dangerous persons was properly categorized as civil, not criminal, particularly where the state had a statutory obligation to provide care and treatment designed to effect recovery for those committed and allowed for release when no longer dangerous, as in the instant Act.

The Act is focused on treating these persons for a current mental abnormality and not for any punitive measures for past actions. Incapacitation has often been recognized as a legitimate civil goal. *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed. 2d 323 (1979).

Respondents argue that an examination of the overall tenor of the act reveals its criminal nature because of the references to specific provisions of the Criminal Code which they claim outweigh the number of references to the Probate Code. In *State v. Boos,* 232 Kan. 864, 659 P.2d 224 (1983), the court was faced with a similar argument. The court, holding that K.S.A. 8-286 was civil in nature and not criminal, acknowledged the various references to the criminal code provisions but held that "the quasi-criminal language used is not the sole criteria for determining whether the statute is criminal or civil". Like the instant case, no criminal sanctions are imposed as are required in a criminal proceeding.

It is the opinion of the court that K.S.A. 59-29(a)01 et. seq. is civil, not criminal, in nature. Both the language and history of the Act and its purposes and effect support

this conclusion. The Respondents have failed to establish that the statutory scheme of the Act is so punitive in purpose or effect as to negate legislative intent that this proceeding is civil in nature. Allen, supra, at 369. Based upon this holding, the court finds that matters of discovery including but not limited to requests for admissions, interrogatories, production and disclosure of documents and witnesses, including expert witnesses, shall be controlled by Chapter 60 of the Code of Civil Procedure. On the matter of necessary and reasonable expenses, costs and attorney fees, as set out in the Act, Sedgwick County will be obligated to provide funds as per court orders to be issued herein.

The state has filed a Motion For An Order Compelling Discovery And Other Relief in both cases. The motions allege that the Respondents were advised by their counsel not to participate in the evaluation process and Respondents have not so participated. Sanctions against Respondents have been requested.

Section 5 of the Act provides that upon a finding of probable cause, that person shall be taken into custody and transferred to an appropriate facility for an evaluation. The evaluation shall be conducted by a professionally qualified person. Judge Clark found probable cause and ordered the Respondents to be taken to the Larned Security Hospital and submit to an evaluation to determine whether the Respondents are sexually violent predators as defined by law.

Within 45 days after the filing of the petition the Respondents shall be provided a trial to determine whether that person is a sexually violent person. The

burden of proving that a person is a sexually violent predator is upon the state.

The respondents have the right to be examined by experts of their choosing and this evaluation would be relevant if Respondents offer this testimony in the trial.

Respondents' refusal to participate may jeopardize the state's position on the burden placed upon it.

This court has found that this proceeding under K.S.A. 59-29(a)01 et seq. is civil in nature. There has been no specific finding by this court that the Fifth Amendment privilege against self-incrimination is applicable in a civil proceeding such as this; however, the prevailing view expressed in *In re Young*, supra, is that persons subject to involuntary civil commitment as sexually violent predators have no constitutional right to remain silent unless it is conclusively shown that sanctions imposed upon that person are tantamount to a criminal proceeding.

This court has found that the Department of Corrections has no involvement in the confinement of Respondents at the Larned Security Hospital. The evaluation is to be done by SRS staff. The only reason that Larned received the Respondents is because SRS at the present time has no "appropriate facility" to detain Respondents and do the evaluation required by law. John House, counsel for SRS has informed the court that if an order is entered to return Respondents back to Larned for evaluation completion that Respondents will be placed in the same facility under SRS control.

Unless Respondents are prepared to conclusively prove to this court that they are subject to punitive measures other than an involuntary confinement at the Larned institution, this court will order that the Respondents be transported to the Larned facility for further evaluation. They are presently confined in the Sedgwick County jail. Further, the Respondents are ordered to cooperate with the SRS staff and participate as the staff deem appropriate in the evaluation as required in this Act.

Unless, Respondents carry this burden, Respondents have five (5) days to comply with this order. Failure to do so will subject them to the various sanctions requested by the state, including a tolling of the 45 day requirement for a trial.

Respondents will remain in the Sedgwick County Jail pending an order from this court to be made at the hearing on September 16, 1994.

This Order is effective this 13th day of September, 1994. Faxes of this Order are being sent to:

The Honorable Michael Corrigan – (316-383-7560)
Nola Foulston, District Attorney – (316-383-7266)
Laura Shaneyfelt, Defense Counsel – (316-269-0474)
Thomas J. Weilert, Defense Counsel – (316-~~263-3805~~) 263-0251
John House, SRS Counsel – (913-296-4960)

/s/ Michael A. Barbara
Michael A. Barbara
Assigned District Judge

LETTER FROM DISTRICT COURT TO COUNSEL CLARIFYING THAT ORDER WAS CONDITIONAL (9/15/94)

September 15, 1994

FAX

TO: Nola Foulston, District Attorney - 316 383-7266
Laura Shaneyfelt, Defense Counsel - 316 269-0474
Thomas J. Weilert, Defense Counsel - 316 263-0251

Re: Beam - 94P963
Hendricks - 94P964

The court's Order and Memorandum Opinion was conditional as to the matter of privilege against self-incrimination. Respondents have the right and opportunity to present evidence and/or legal arguments on this issue. This court cannot "shut its eyes" on what the prevailing view appears to be. Counsel will have full opportunity to be heard on this issue.

/s/ Michael A. Barbara
Michael A. Barbara
Assigned District Judge

**TRANSCRIPT OF PROCEEDINGS
OF SEPTEMBER 16, 1994**

* * *

[p. 20] necessary to make some record about the types of things that will be happening to them under this Act and with that in mind, I request the Court to make a record now, present evidence.

THE COURT: Any objection?

MR. WEILERT: No, Your Honor.

THE COURT: All right.

MR. PUNTCH: Terry, would you please come forward?

TERRY E. DAVIS,

called as a witness on behalf of the Petitioner, The State of Kansas, having been first duly sworn, testified as follows:

MR. PUNTCH: Before we proceed, I should also let the Court know on the record that prior to the time the witnesses have been called, they have been made available to counsel for the respondents and they have had an opportunity and in fact did speak with the witnesses before testimony today without us being present.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. PUNTCH:

Q. For the record, would you tell us your name please?

A. Terry Davis.

[p. 21] Q. And what do you do for a living?

A. I work for Mental Health and Retardation Services which is a division of SRS.

Q. How long have you worked for them?

A. In Topeka, in central office, I've worked for six years.

Q. And before being in Topeka central offices?

A. I worked for MHRS in state mental hospital.

Q. What – and here in Kansas?

A. Yes.

Q. What mental hospital?

A. Osawatomie State Hospital.

Q. How long did you work there?

A. Since 1979.

Q. What did you do at Osawatomie State?

A. I was a staff nurse; I also was a supervisor.

Q. What's your current job title?

A. Director of Quality Assurance.

Q. And can you tell us what that means; what do you do?

A. Well, I have a multiplicity of jobs. I do investigations of private psychiatric hospitals, I'll recommend to the Secretary licensing psych hospitals, I oversee the NFMH Program.

Q. Could you tell us what that means?

A. NFMHs are nursing facilities for mental health.

[p. 22] Q. All right.

A. There are 14, I think, currently. We downsized the entire program and what they are is nursing home – nursing facilities that basically specialize in the care and treatment of persons with mental illness.

Q. I believe you said just a moment ago that you make recommendations to the regulatory board to license private mental facilities?

A. The Secretary's the one who issues the licenses for private psychiatric hospitals and I do the investigations and surveys and so forth for the State, and basically make a recommendation to the Commissioner and the Secretary.

Q. In general, what do the investigations that you make of private hospitals consist of?

A. Well, basically whether they're complying with the quality of treatment issues and if they have the appropriate facilities and staff to treat the – the patient. I also take a look at whether or not they're complying with joint commission on hospital accredidation regulations and HIKFA certification requirements.

Q. And your – I presume you're required to be familiar with all of those qualification requisites to do that job?

[p. 23] A. Yes. I also do a lot of other things with the agency. I mean, I consult with the psychiatric hospitals and – and get involved in the certain specific program issues that the Commissioner asks me.

Q. Before we come back to specific programs, I wonder if you could just tell us briefly your educational background, training, experience that you've had for the work you are doing now?

A. I have a BS in Nursing, I have a Master's Degree in Health Care Administration. Okay. In terms of experience, I have considerable experience with the military on active duty. When I got out of the military in '79, I went to work for MHRS in the state psychiatric hospital. I've done consulting work for the area in terms of the program development for stress management, psychiatric augmentation, and I currently am the Executive Officer for the 1908th CSC Detachment, which is a mental health augmentation unit in Topeka. And –

Q. Does your work for the Secretary require you to visit the various mental health facilities here in the State of Kansas?

A. Yes.

Q. And as a result of your work there, are you familiar [p. 24] with them and their surroundings?

A. Yes.

Q. Mr. Davis, were you asked by the Secretary to perform a function with initiation of a treatment program for sexually violent predators?

A. I was asked by the Commissioner, yes.

Q. I beg your pardon, the Commissioner? What were you asked specifically to do?

A. Organize programmatically and instruct really the – the program, the sexual predator program for SRS. Under Senate Bill 525 SRS, of course is mandated to set up a program to treat, you know, sexually violent predators.

Q. Are you involved in the process of selecting treatment personnel for that part of the program?

A. Yes.

Q. Are you also responsible for the cite where the program will be?

A. The cite for where the program will be was basically agreed upon before I was asked by the Commissioner to get involved in the program.

Q. Where is the location of the sexually violent predator program today, where will it be?

A. It will be on unit F-4 of the Larned Correctional Mental Health Facility.

[p. 25] Q. Have you been to unit F-4?

A. Yes, sir.

Q. Can you tell us a little bit about what unit F-4 is like?

A. Well, it's basically a typical ward environment. I mean, it's a hallway with rooms on each side, with a day hall in the front, that's the configuration of it.

Q. How many patients can be treated there?

A. 30.

THE COURT: Mr. Puntch, for clarification, is he testifying concerning what will be when they complete the program?

MR. PUNTCH: I'm getting to that. I'm starting with today and working forward, Your Honor.

THE COURT: Okay. Thank you.

Q. (By Mr. Puntch) While the patients in the sexually violent predator program are in treatment there at the facility you have today, will they be afforded the rights as the other mental patients are, as the laws under the State of Kansas?

A. You mean when we start the sexual predator program at Larned Correctional Mental Health? Today we have no one in the program.

Q. I understand. Once the program begins and you –

[p. 26] A. All right.

Q. – do have patient in programs. Does that, help you understand my question?

A. Yeah, yes, right.

Q. Okay. As I'm sure you are aware, under Article 59 of the Kansas statutes, mental –

A. Right.

Q. – health patients have certain rights?

A. Correct.

Q. Okay. And you are familiar with those?

A. Oh, yes.

Q. Will the patient in the sexually violent predator program be accorded those same rights?

A. Yes.

MR. WEILERT: Well, Your Honor, I object. First of all, the statute itself is considerably different from the rest of Chapter 59 as far as the evaluation and release procedures, the furlow procedures. If Mr. Davis is testifying that those are the same, then he is obviously incorrect and would ask the Court to take notice of the statute rather than what he is saying.

MR. PUNTCH: Your Honor, I'm not sure, what's the legal basis of the objection? I'm not sure how to respond.

[p. 27] THE COURT: What's the legal basis for your objection?

MR. WEILERT: Your Honor, it's the form of the question; it calls for a legal conclusion that Mr. Davis isn't capable of making.

THE COURT: I assume that you're – your question assumes a basis that the rights of these patients are the same that other patients have and – and according to the objection, apparently they're not set out similarly, programs, we need to clear it up.

MR. PUNTCH: All right.

THE COURT: With his background, whether he knows what the rights are rather than just a statement he understands – he knows the rights, but how about specifically what are the rights.

MR. PUNTCH: Very well, Your Honor. We'll proceed in that fashion.

Q. (By Mr. Puntch) The rights which are generally accorded mental health patients under Chapter 59, are you familiar with the specific rights? For example –

A. Well –

Q. – as I understand it, if patients in treatment have a right to wear their own clothes?

[p. 28] A. Correct.

Q. And not wear a uniform?

A. Correct.

Q. It's those kind of things I'm talking about.

A. Correct.

Q. And with the regard to the patient in sexually violent predators program, are they going to be able to wear their own clothes?

A. Yes.

Q. All right. I think – do you have a clear recollection at this point of what the rights under that section are?

A. That's why I carried my briefcase.

Q. Okay.

A. So I can always refer to it.

Q. You can refer to?

A. Okay.

Q. Have you been handed what looks like a blue notebook?

A. Yeah.

Q. With some things in it?

A. That's what I keep in my briefcase so that I can refer to it, because my memory isn't the best usually.

Q. Are you going to refer to a specific statute now to [p. 29] review those things I've asked you about?

A. This is mental health law.

Q. Okay.

A. 59-280 – no, let's see, Article 29, Care and Treatment of Persons. Care and Treatment for Mentally Ill Persons, 59-290, 1 through whatever.

Q. And in that are specifically listed some rights accorded patients?

A. Right.

Q. Who are simply committed?

A. 59-2929.

Q. All right. And can you tell me what those are?

A. Is to wear your own clothing, keep and use personal – patient's own personal possessions including

toilet articles, keep and be allowed to spend the patient's own money.

Q. All right. I want you to read through those and if you come to any of those that will be different with the sexually violent predators program, why don't you tell us?

A. Okay. The one issue, allowed to keep and have their own money, they will have access there – they will have money and they will be able to order through the canteen fund.

Q. All right. Will they be able to order items from [p. 30] outside the grounds?

A. Yes.

Q. For example, could they get a tie from a Lands End catalog if they were there?

A. Sure.

Q. All right. Please continue.

A. Okay. To communicate by telephone. Both make and receive confidential calls, by letter – both by mail and receive unopened correspondence except that if the head of the treatment facility would deny the patient's rights to mailing or receive unopened correspondence under the provisions of Subsection B, such correspondence shall be opened and examined in the presence of the patient, yes. Conjugal visits in the facilities are available. We –

Q. Are there any facilities that are available?

A. There are no facilities available in any of the institutions or Larned Correctional Mental Health Facility.

Q. Okay. Any mental health institution run by the State of Kansas?

A. Correct.

Q. No facilities are available for conjugal visits?

A. Correct.

Q. Okay. Continue.

[p. 31] A. To receive visitors each day, yes. To refuse involuntary labor and to be paid for any work performed other than that of housekeeping of the patient's own bedroom and bath, subject to provisions of K.S.A. 1992, that's so on – yeah.

Q. Okay.

A. Not to be subject to such procedures as psychosurgery, electroshock therapy, experimental medication, aversion therapy, or hazardous treatments and procedures without the written consent of the patient and the written consent of a patient guardian or other person in a local parentis, if such person has a living parent or guardian or other local parentis, yes. To have explained, the nature of all medicines prescribed, the reason for the prescriptions and the most common side effects and if requested, the nature of any other treatment ordered, yes. To communicate by letter with the Secretary of Social and Rehabilitations services, the head of the treatment facility and the court, physicians, psychologists, minister of religion, including Christian Science practitioner or attorney,

and such communication shall be forwarded at once to the addressee without examination. Communication from such persons shall [p. 32] be delivered to the patient without examination, yes. To be visited by the patient's physicians, psychologist, minister of religion including Christian Science practitioner at any time, yes. To be informed orally or in writing of the patient's rights under the section upon admission to the treatment facility, yes.

Q. Very well. Now, while they are in the sexually violent predator program in treatment, will they have their own room?

A. Yes.

Q. While they're there there in treatment will they receive a per diem or a payment?

A. Per diem or payment?

Q. Do they receive any kind of wage or anything for being there?

A. No.

Q. No; okay. Now, the place where they're going to be housed initially if the treatment program begins, will that be locked?

A. Yes.

Q. Will they be kept separate from other patients there at the same facility?

A. Their - currently there are no patients at the Larned Correctional Mental Health Facility.

[p. 33] Q. All right.

A. There – it's a DOC facility.

Q. Okay. The initial facility that you're going to have for the sexually violent predator treatment program, you've described to us, are there plans for moving to a different location or remain at the same cite?

A. There are preliminary – preliminary plans in conjunction with DOC to build a different configuration within the Larned Correctional Mental Health Facility for the sexual predator treatment program.

Q. The location where the people in the sexually violent predator program is will belong, essentially, to them alone; is that what you are telling me?

A. Would you repeat that?

Q. The building where they are going to be, that will be just for them?

A. Yes, the unit that they're going to be on, the ward, yes.

Q. Okay. Can you tell us how the ward will be staffed?

A. They will be staffed by SRS employees.

Q. I see. And will they be in charge of the day-to-day running of the facility?

[p. 34] A. The ward, yes.

Q. The ward, all right.

MR. WEILERT: Excuse me, Your Honor. I haven't been listening close enough perhaps. Are we talking about what the facility is now, what Mr.

Hendricks and Mr. Beam would be committed to, you know, in two weeks or whenever that would happen or this new facility that is proposed?

MR. PUNTCH: I'm still talking about the facility now, where they've been housed.

MR. WEILERT: Thank you.

THE COURT: Are we all agreed?

THE WITNESS: Right.

Q. (By Mr. Puntch) The ward where they will be committed to.

A. There is one issue, initially there's a transition phase.

Q. Okay.

A. The unit F-4 currently is occupied by DOC folks, okay.

Q. Department of Correction folks?

A. Right, the mental –

THE COURT: Excuse me. You say folks, you mean staff or –

THE WITNESS: Inmates.

[p. 35] THE COURT: Inmates, okay?

THE WINTESS: Inmates.

Q. (By Mr. Puntch) What's – what will happen to them?

A. Well, they will be transitioned out but not immediately, so –

Q. All right.

A. I have discussed with the warden, you know, how we will keep the, anyone who's committed in the sexual predator program separated from the inmates while they transition those people out.

Q. Have you all arrived at a plan to do that?

A. Yes.

Q. How long is this transition period expected to last?

A. I really can't answer that question; it shouldn't be very long, but the Department of Corrections facilities don't have any room; in SRS facilities we would normally use, they have no room either. I spoke with the warden and he feels that a lot of the current inmates in that unit can be transitioned back into the general population in the prison system, so that –

THE COURT: How many inmates are there?

THE WITNESS: Currently on that unit? I – this is a guess, I would say 25, 26.

Q. (By Mr. Puntch) What are the plans that you have to [p. 36] keep people committed under the Sexually Violent Predators Act separate from the other people on the ward during the transition period?

A. Okay. We've discussed building a petition on the hall – on the hall, a gate basically and then my staff would be in the attendance strictly in attendance with anyone committed to the sexual predator program; they will not be DOC staff. During any time when they've

been on the day hall they will be escorted, as they currently are, by SRS staff.

Q. Have you made provision for the treatment component, not the physical?

A. Yes.

Q. That facility now, the treatment components of the program?

A. Yes.

Q. Can you tell us what you've done with regard to that?

A. The agency published an RFP, a Request For Proposal to provide clinical treatment for the sexual predator program. We've subsequently received two proposals. We've gone through the point of having negotiations and then we've even gotten the best and final offer from two agencies which have presented [p. 37] us with proposals where we currently – we're in the process of, we aren't, but Department of Administration, Division of Purchases, is the one who writes the contract, so at this point we're in the – we're in the process of issuing a contract.

MR. PUNTCH: Excuse me.

(At this time Petitioner's Exhibit 1 was marked for identification.)

Q. (By Mr. Puntch) I've got six deep of pages that are stapled together and on the back is written Petitioner's Exhibit Number 1. Would you just glance briefly through that document and see if you recognize what that is?

A. This is – that is the RFP that the agency published, the Request For Proposal.

Q. And is that the RFP as you call it, that two different mental health care providers have submitted proposals on and is that the same RFP that each of those providers have qualified under?

A. Yes.

Q. Before your testimony this afternoon, did you have a chance to meet with the counsel for the respondents [p. 38] and share with them and give them a copy of Petitioner's Exhibit Number 1?

A. Yes.

MR. PUNTCH: Your Honor, I move to admit Petitioner's Exhibit Number 1.

THE COURT: Objection?

MR. WEILERT: Your Honor, we object because basically this just sets out what the proposal was, we don't have any idea what the proposed contractors are doing in response to this proposal and we don't know who the contractors are. We don't know anything about the qualifications of their staff, so this in and of itself is irrelevant, we feel.

THE COURT: Mr. Puntch.

MR. PUNTCH: Well, actually, Your Honor, I think it's relevance is perfectly clear to the Court.

THE COURT: Let me see it.

MR. PUNTCH: One of the questions is the treatment program that is being proposed and which of

the components of it, and Petitioner's Exhibit Number 1 answers a number of those questions.

THE COURT: Both of the proposals in here are the – what the two providers are going to furnish anybody?

[p. 39] THE WITNESS: We have received them, yes, sir.

THE COURT: Are they – is that included in here?

THE WITNESS: No.

Q. (By Mr. Puntch) That's the requirement that each of the – I'm going to call them bidders?

A. Right.

Q. Or proposals required to – to cover are shown in Petitioner's Exhibit Number 1; is that right?

A. That's correct.

Q. If they didn't cover each of the requirements in there, their proposal would not be accepted?

A. Correct.

THE COURT: And both providers or bidders have been given the same information?

THE WITNESS: Yes.

Q. (By Mr. Puntch) Has a proposal been accepted as of today?

A. I can't say whether it's been accepted; I mean both – both proposals met the requirement and now after

we received that and the – my agents review them to make sure that everything that we wanted is in them, they go to the Department of Administration who takes a look at the physical impacts and then [p. 40] they'll finalize the contract. To – to my knowledge, that has not happened yet. It should happen, it could have happened yesterday, I wasn't in Topeka yesterday, so I couldn't tell you.

Q. Is it expected to happen within the very near future, if not earlier?

A. Oh, yes, yes.

MR. PUNTCH: Your Honor, I would request that Exhibit 1 be admitted.

THE COURT: Is it possible contractually that the provider could modify this contract or –

THE WITNESS: No.

THE COURT: Either they accept this or don't get the job or what's the situation?

THE WITNESS: No.

THE COURT: No what?

THE WITNESS: They can't. They can't modify that, no. I have looked at the best and final offer and the program and they – they meet those, both of the bidders meet the qualifications.

THE COURT: I'll overrule the objection, I'll admit the exhibit.

Q. (By Mr. Puntch) When the proposal is tendered to one of the two bidders, a contract is finalized. What is

the time frame when their mental health [p. 41] parishioners will begin the treatment program there?

A. Approximately –

Q. Tomorrow?

A. Approximately 60 days.

Q. In the intervening period –

THE COURT: Excuse me, 60 days from when?

Q. (By Mr. Puntch) From when?

A. The contract.

Q. The contract day?

A. The signing of the contract.

Q. When, in the intervening period of time between today, the signing of the contract and the time that the contractual mental health providers are there – what will be going on in the treatment program with people who are in the program?

A. Well –

Q. Will anyone be provided treatment?

A. If someone is committed to the treatment program, I made arrangements with the superintendent to provide professional staff at Larned to eliminate the preliminary phases of the program.

Q. When the program begins and there are patients in the treatment program, who will be responsible for doing everything within the ward, providing treatment, doing the usual functions, keeping the [p. 42] ward running, what agency?

A. SRS. Yeah. I will be. Until I can hire a program director, I'll be doing it.

Q. All right.

A. That was – let me interject one thing in that RFP that you've submitted. That was one change in the negotiations that we made. We will be providing the program director and not the – not the people providing the clinical services, that I will provide a clinical director, for the time being, I'm the program director.

Q. Very well. The program director will be someone from SRS?

A. Yes.

Q. All right.

Q. Who will be responsible for security on the ward itself?

A. SRS employees.

MR. GREENO: Excuse me, could we see the exhibit please?

THE COURT: Yes, sure.

MR. GREENO: You can go ahead.

Q. (By Mr. Puntch) Who will be responsible for security on the perimeter of the outside of the facility?

[p. 43] A. The Department of Corrections.

Q. And within the security perimeter of DOC are there other programs that will be going on besides this one, other buildings there or other facilities?

A. Yes.

Q. Can you tell us what those are?

A. Well, the Larned Correctional Mental Health Facility is a facility that was established by Department of Corrections to treat persons with mental illness that were in the prison system and those programs will be going on.

Q. Are there other, I'm going to call them security wards, also within that perimeter?

A. Yes, there – yeah. DOC has other wards, yes.

Q. Other than providing, what I'm going to call perimeter security or security, is there walls around this facility? Maybe I should have asked that?

A. There's a fence, yes.

Q. Okay. Providing security at the fence, other than doing that, will the Department of Corrections be responsible for any of the program?

A. No.

Q. Mr. Davis, if – if one of the patients in the sexually violent predator treatment program does [p. 44] work, decides to work, will they be paid for the work?

A. Yes.

Q. Do you know at what rate?

A. That hasn't been established at this point; we have no funds for that so that won't happen. I mean, they won't be allowed to work, I mean unless they want to work on a voluntary basis on the units, some small tasks,

but pretty much, in terms of going into another area and working like an inmate would, no, we don't have funds set up for that at this point.

Q. That hasn't been done as of this time?

A. No.

Q. Now, have you been to the treatment program facility in the State of Washington?

A. Yes.

Q. And are you – are you aware that the Kansas statute is in most ways the same as Washington statute?

A. Yes.

Q. Can you describe how the facility in Larned is the same or is different, either way, as the facility in Washington state, that you've seen?

MR. WEILERT: Object, Your Honor, it has no relevancy to the Court's decision here today.

THE COURT: I'd have to hear more [p. 45] foundation, see what relevancy it has.

MR. PUNTCH: Very well, Your Honor.

Q. (By Mr. Puntch) You have seen that facility there in Washington; is that correct?

A. Yes, yes.

Q. And you have been there while treatment has been provided?

A. Yes.

Q. You have seen, – was that before – well, tell me when you saw that, maybe that's a better question. When did you go up there?

A. May, I think. I don't know, several of us flew back there and –

Q. What was the purpose of going there?

A. To get an orientation of the way they do things, as far as – there is so much involved in the sexual predator law, all the way from this phase to the treatment phase to the clinical phase to the security, all those things we needed – we needed an understanding of how their – they're accomplishing what their law says.

Q. The things that you saw and learned there, did they form part of the basis of the kind of facility that Kansas is going to have?

A. Yes.

[p. 46] Q. Can you tell me what things that you saw there and discussed with staff there, helped to forge part of the basis of the kind of facility Kansas is going to have?

MR. WEILERT: Your Honor, once again, I object at this point. It certainly appears to be irrelevant and of no probative value.

MR. PUNTCH: Well, on the contrary, Your Honor, the facilities in the State of Washington's part and parcel to the litigation in the case of In re Young, where identical issues to those raised by counsel for respondents have been raised in this hearing. The type of facility, how the facility came to be is one of the issues that the Court needs to hear in order to resolve the questions

which they've raised, particularly with regard to the issue of privilege, how and where we're getting to where we are and the basis that is clearly relevant.

THE COURT: Did I – do I recall somewhere in looking at Young that Washington statute was enacted about 1980, anybody know for sure?

THE WITNESS: I think it was 1990.

MR. WEILET: '90.

MR. PUNTCH: I think it was '90, Your Honor.

THE COURT: So they have had four years to [p. 47] work on their statute then?

MR. PUNTCH: Yes, Your Honor.

THE COURT: And you were there when, sir?

THE WITNESS: In May.

THE COURT: Of this year?

THE WITNESS: This year.

THE COURT: I'll allow – I'll allow the question. I'll allow the background that he can give us to – I'm assuming what he's going to testify is what he saw up there may apply here.

MR. PUNTCH: Yes, Your Honor.

THE COURT: At a treatment program.

MR. PUNTCH: That's the purpose of my question.

THE COURT: I'll allow it along those lines.

Q. (By Mr. Puntch) Do you want me to repeat the question or –

A. Yeah, repeat the question now.

Q. With regard to the visit that you made to the facility in the State of Washington for treating sexually violent predators, I'd like to know the things that you saw, heard and did there that helped you form a basis for the facility that we're going to have here in Kansas and the treatment program we're going to have.

[p. 48] A. We interviewed all levels of staff, including the treatment staff, the direct care staff and interviewed even some residents in the program. We made general observations of – of the layout of the facility and we did careful examinations of their procedures and policies. Talked a lot on the evaluation process with the – the director of psychology who does most of the evaluation for the program.

Q. Where is the – I'm sorry, where is the treatment facility in Washington state located?

A. In Monroe State Penitentiary.

Q. Is that a state penitentiary?

A. Yes, it is.

Q. Is it on the grounds of the state penitentiary?

A. Yes.

Q. If you know, Doctor, who – who provides the treatment components of the program there in the State of Washington?

A. Who provides the treatment program?

Q. MH?

A. The treatment program.

Q. What agency, I guess, is what I'm asking.

A. Subpart of SRS provides that.

Q. The treatment program which is used in the State of [p. 49] Washington for the sexually violent predators, have you adopted any of that treatment program for these here in the State of Kansas?

A. Yes. The providers who submitted the bids to us also contacted Washington and reviewed the program because they wanted to see how they were going to do it so I can say that both the potential clinical providers are also modeling what they treat – their treatments after Washington.

MR. PUNTCH: Your Honor, I don't believe I have any further questions. No further questions.

THE COURT: Mr. Weilert, cross?

MR. WEILERT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WEILERT:

Q. Mr. Davis, Mr. Puntch asked you whether the persons who would be committed under the Sexual Violent Predator Act would have the same rights as those committed under other statutes for the care and treatment of mentally ill; do you recall that question?

A. Yes, these –

Q. Okay. If you go a little bit farther through the statute dealing with those type – or with the care and treatment of mentally ill persons –

[p. 50] A. Mm-hmm.

Q. – there are other provisions, are there not, regarding furloughs for people in those treatment facilities, aren't there?

A. I just – I just addressed the issues of the patient rights, I –

Q. Well, don't you think a right to a furloughs is a patient right?

A. Well, not according to this.

MR. PUNTCH: Object.

THE COURT: Just a minute.

MR. PUNTCH: Object. It's argumentative, Your Honor.

THE COURT: Overruled. You may answer, sir.

A. The right to a furlough? It's not addressed in this – in the – in the patient's rights, 1 through 10 that I enumerated under that.

Q. (By Mr. Weilert) Okay. But you are aware that the act for the care and treatment of the mentally ill persons does provide for furloughs, are you not?

A. It's possible to get a furlough from the hospital.

Q. Okay. And it's also provide – that Act also provides for release procedures which can be accomplished

simply by the head of the facility there the person is being held to release that [p. 51] person; isn't that correct?

MR. PUNTCH: Excuse me, again before you answer, I wish to object on the grounds of relevance as furlough release procedures are all specifically dealt with in the statute covering sexually violent predators.

THE COURT: Well, I think Mr. Weilert's point and maybe I misunderstood it too, that on direct exam, you likened the rights under this statute to other patient rights and I thought he said that they were the same and then he started reading off those similar ones; am I misunderstanding something here?

MR. WEILERT: That's my understanding, Your Honor.

MR. PUNTCH: Well, Your Honor, I think that what Mr. Weilert's talking about is in a different statute than the one Mr. Davis was asked to refer to.

MR. WEILERT: I believe he referred to 59 Section 2901 et seq.

THE COURT: Well, he–

THE WITNESS: 2929.

THE COURT: 2929 I thought, he pinpointed.

MR. WEILERT: Okay. Then those specific [p. 52] procedures I've talked about are not in 20 – 2929.

THE COURT: 2929 – 59 dash.

MR. WEILERT: But they are in the Act for the care and treatment of mentally ill persons which the

general answer at the beginning was that, yes, they have the same rights.

THE COURT: Well, perhaps maybe a little confusing, Mr. Puntch's questions concerning rights were directed to this statutory provision and what you're contending, using some other provisions, that they have different rights and I don't know whether that's relevant, if they have other rights in other – for other provisions unless you're showing that what they don't have under this Act, what the patients don't have under this Act may affect the – the status of whether this is criminal or–

MR. WEILERT: Quasi-criminal, yes, sir.

THE COURT: Okay, well if he knows, I'll let him answer. He may not have the personal knowledge.

Q. (By Mr. Weilert) Are you aware–

THE COURT: Wait for another question.

THE WITNESS: Yeah.

Q. (By Mr. Weilert) Are you aware, sir, that under other provisions other than 59-2929 of the Act of the care and treatment for mentally ill persons–

[p. 53] A. Sure, yes.

Q. – that a director of a mental health facility can authorize the release of a patient without any hearing in court or any court intervention?

A. If you're asking me specific knowledge I couldn't quote you, I mean I'm basically aware that those things exist, yes.

Q. That under the Sexually Violent Predator Act that cannot potentially happen?

A. No, it can't.

Q. Your understanding of Senate Bill 525 requires a – basically a jury trial?

A. Correct.

Q. Okay. You talked about, and this is specifically under the 59-2929, about certain rights, said that persons committed under the – the general civil commitment statute are allowed to wear their own clothes?

A. Yes.

Q. Are you familiar at all, sir, with any of the Department of Corrections regulations for persons in a mental health facility?

A. Yes.

Q. Run by the – run by the Department of Corrections?

A. Yes.

[p. 54] Q. Are those persons allowed to wear their own clothes?

A. No.

Q. Okay. Are they allowed to have personal possessions?

A. Some, yes, as – as they meet the DOC criteria, they have a specific regulation deliniating what people can have.

Q. Is it correct that SRS also has regulations deliniating what people can have?

A. Not specifically.

Q. So, a person committed under the sexual predator act could bring anything, any personal property he wanted into the facility?

A. With certain limitations.

Q. So you do have limitations on it?

A. There would be limitations.

Q. Possessions?

A. Yes.

Q. Um–

A. Well–

Q. How about to the person in DOC custody, can they have personal funds to order through a canteen or some sort of facility for personal items, cigarettes, that type of thing?

A. Yes.

[p. 55] Q. Can persons in Department of Corrections custody communicate by telephone with lawyers and family members?

A. Yes, as far as I know, they can.

Q. Are they allowed to have unopened correspondence or if their correspondence is going to be opened, have to be physically present when it's done?

A. Can I preface all this by saying I'm not intimately familiar with all of the DOC regulations?

MR. PUNTCH: Your Honor, I'm going to object. Clearly the witness doesn't have the basis of knowledge to answer the question.

THE WITNESS: I think that's the case but I don't know.

THE COURT: I think, yes, we need someone with more direct knowledge. Then the earlier objection concerning the rights of the patients where Mr. Puntch made the objection, I'll retract it when I overruled it. I think we need to have someone more knowledgable concerning rights of clothing, personal property, DOC, and I don't think this witness is competent or qualified, to give his own testimony, to give those answers.

MR. WEILERT: That's fine, Your Honor, that is why I asked if he was familiar with them, but [p. 56] apparently he is not.

Q. (By Mr. Weilert) In the event that someone was to be committed under the sexual predator act, say in the next three weeks, where would that person go?

A. Larned Correctal [sic] Mental Health Facility.

Q. To this F-4 unit?

A. Yes.

Q. Okay. Now, F-4, that's, is that like a hallway that–

A. Yes.

Q. – connects with a larger facility?

A. Right.

Q. How many hallways or whatever are there in that building?

A. Five, I think.

Q. Okay. And are they F-l, F-2, F-3, F-4 and F-5?

A. Something like that. I couldn't tell you exactly what the numbers are.

Q. Do those hallways all come into a central area?

A. Yes.

Q. What's located in that central area?

A. Guard – a guard area, I don't know, what they call it, central control area.

Q. A central control area?

A. Yes.

[p. 57] Q. Okay. Who staffs that central control area?

A. Department of Corrections.

Q. And will that also occur, and once again this is all supposing we are three weeks down the road and someone's committed, Department of Corrections will staff that central control area?

A. Yes.

Q. Are there facilities for recreation?

A. Yes.

Q. Where are those located?

A. Throughout the facility, some are on the outside, they have various recreational areas outside, baseball diamond and you know, they also have like weight rooms and libraries and indoor gym – gymnasiums in the facility and those kinds of things.

Q. Are all those facilities available for someone committed under the sexual predator act?

A. Yes.

Q. Are they also available to persons in the custody of the Department of Corrections?

A. Yes.

Q. How about sleeping quarters, are people committed under the sexual predator act, you said they have their own rooms?

[p. 58] A. Yes.

Q. What else is contained in the rooms besides a bed?

A. Toilet facility and a sink.

Q. Okay. And on the other hallways of this building that are in Department of Corrections bailiwick, do they have the same private rooms and facilities?

A. Yes.

Q. What about food, who provides the food for the persons committed unde [sic] the Sexually Violent Predator Act?

A. All the food in that Larned Correctional Mental Health facility is supplied by Larned State Hospital.

Q. Okay. So they have the same food that the Department of Corrections inmates have?

A. Correct.

Q. What about laundry facilities or service?

A. There again, that's provided by Larned State Hospital.

Q. And it's also the same as that for Department of Corrections people?

A. Correct

Q. Separating out, if you can, and I don't know if you can, actual medical treatment as opposed to the psychological treatment or mental treatment, where [p. 59] is that provided for these people?

A. Medical treatment?

Q. Yes.

A. That's provided by Larned Correctional Mental Health Facility through their contract with PHS.

Q. Okay. And that's the same as the Department of Corrections?

A. Correct.

Q. Isn't it inasfar as, let's say a secured facility, describe that for us, as far as the sexual predators are concerned?

A. It's on the unit there, I don't know what I don't know how to describe it to you. It's a shower.

Q. It's just a–

A. Shower unit.

Q. Kind of a communal shower-type thing?

A. Yes.

Q. Is it the same as the Department of Corrections facility has?

A. Yes.

Q. What specific security would SRS provide on the facility for sexually violent predators?

A. Specific security – basically intervening – I'm going to have to pause and think through how to answer. It's – security that is provided on [p. 60] that unit will be the same as provided in a hospital and that's basically intervening in behavioral-type situations, making sure that the ward rules are complied with, that the treatment programs are complied with. When you – when you ask this in a mental health situation, this is all integrated into the master treatment planning process. You know, so – the – it's just all together and it's part of the treatment planning process.

Q. Would it be correct then that the security aspects of the treatment plan are very similar to those used in the Department of Corrections facility?

A. Probably not, no.

Q. Okay. What would be different, sir?

A. Well, in the mental health facility you develop a master treatment plan to target specific behaviors for

change. Okay, so part of what the staff is doing is making sure that those issues that are identified in the master treatment planning process are complied with and – and the treatment goes forward with that and that intertwines with security issues that you're talking about. I mean if someone, for instance, became violent, I – I suppose the staff would subdue that individual and put them in the leather cuffs and belts, I suppose. [p. 61] We usually avoid that at all costs but if the ultimate intervention, behavioral intervention would be that.

Q. Let me back up and maybe I can ask a little better question. In the proposal for the contractors to provide services with the sexually violent predators, are there persons set out in that proposal, who would do nothing other than act as security guards?

A. No.

Q. Is it correct that in the Department of Corrections portion of the facility, there are no in – people who do nothing but act as security guards?

A. Department of Corrections people, yeah, they have security guards, I guess, I mean as far as I know, they do.

MR. PUNTCH: Your Honor, I ask that the answer be stricken again on the basis of the witness' knowledge.

THE COURT: Yes, sustained, unless he has some personal knowledge of this thing.

Q. (By Mr. Weilert) Who are the two contractors who have submitted bids for this work?

A. DECCA and Prison Health Services.

Q. Okay. Do you have any knowledge whether or not the [p. 62] Department of Corrections has a contract for services with either of those?

A. I believe they do, yes.

Q. With both of them, if you know?

A. At one time or another they have; as to what the current status with DOC and these two providers is, I really couldn't specify. I mean, but I know there have been relations in the past, yeah.

Q. As far as the type of treatment that is proposed to be given to sexually violent predators, does that include some aversion treatments or aversion therapy?

A. It could. It's a lot – I guess I would describe it more as behavior modification.

Q. Does it also include the use of certain drugs, in particular–

MR. PUNTCH: Your Honor–

THE WITNESS: If you're referring to the use of Depo-provera–

MR. PUNTCH: Your Honor, I'm going to object to the form of the question which is vague and conclusive. The PDR is about four inches thick. If there is something counsel has on his mind –

Q. (By Mr. Weilert) Does it include the use of drugs that are used to be considered experimental in [p. 63] nature?

A. We wouldn't use experimental drugs, no.

Q. Okay. And in particular, Depo-provera, do you consider that experimental?

A. It may be experimental, I wouldn't know how to classify it. I know what this is and I know it's used, as to whether it's experimental, but we wouldn't use it.

Q. Okay. And–

Q. Do you have any knowledge, sir, concerning the drug Depolupron, L-u-p-r-o-n?

A. No, I don't.

Q. At the current time, at the Larned facility where the F-4 unit is located, do you know who the mental health provider for the Department of Corrections is?

A. I – I can only conjecture a thought. I think it would be HS–

MR. PUNTCH: I'm going to object to conjecture, Your Honor.

THE COURT: Sustained.

Q. (By Mr. Weilert) Say that a person, if a person was to be committed, say within the next three weeks or so, that the superintendent up at Larned State Hospital would be the person you would or [illegible]RS would [p. 64] look to to provide treatment; is that correct?

A. Correct.

Q. Who is that person?

A. Doctor Monte Lee.

Q. Okay. Does that person, to your knowledge, have any expertise in the treatment of sexually violent persons?

A. Not that I'm aware of, he's the superintendent though, it's not expected that he would.

Q. Do you have any personal knowledge whether anyone at the Larned State Hospital has such knowledge?

A. Not specifically, no.

Q. What, under the proposal, you have submitted to these two contractors are the duties of the program director?

A. Under what the original proposal was they – it would be what we call a clinical director and a program director, okay. We felt that since SRS had the legal responsibilities that the program director, the overseer of the program needed to be an SRS employee, because we were going to contract out, we felt that it was important to safeguard the State of Kansas in the program and therefor we changed the program director, what's referred to as the program director, into a clinical director which [p. 65] means that they have responsibility for overseeing the clinical aspects of the program.

Q. Are you familiar with any legislation, sir, that allows SRS to contract out the responsibilities given them by Senate Bill 525?

A. Not specifically, no.

Q. Persons who would be – strike that. You said you went to the facility up in Washington state, I believe, Monroe–

A. Right.

Q. – State Penitentiary?

A. I think that's what they call it, yeah, state penitentiary at Monroe, Washington.

Q. Describe for us the physical facility for the sexual predator division at that location.

A. Okay. On the unit themselves, on the unit themselves, they're like hallways, there's – it's two floors; okay? There's hallways down each side and in the middle there's security, central security location where it's – they have guards in there that, you know, operate the doors, provide the security.

Q. Okay. Are there any Department of Corrections persons in that facility?

A. Inside – on the ward, no.

[p. 66] Q. How about in the same building?

A. Oh, yes.

Q. In – how long were you there?

A. Two days.

Q. How much of your time did you spend actually observing treatment?

A. Couple hours I suppose, several hours, I don't know.

Q. How many individuals were there incarcerated in that unit at the time you were there?

A. I think 24.

Q. Pardon me?

A. I think 24.

Q. Okay. And of those 24 persons, how many did you actually see in treatment?

A. Well, I know this – because I spoke with the staff, approximately half of them are not accepting treatment based on advice of their attorneys. Okay, the rest of them are participating in treatment except for a handful which are there just for the evaluation process, okay. So, I suppose they're – at ten, in terms of how many I personally observed, I don't know. Probably that many at one point or another.

Q. Okay. If you said half weren't accepting treatment and half were, or a handful were there for [p. 67] evaluation, wouldn't that leave about six or seven people actually participating in treatment.

A. I suppose seven or eight, yeah.

Q. In attempting to come up with this request for proposal; is that right?

A. Yes, RFP.

Q. Did you do any research about the – for lack of a better word, success of any treatment program for say a pedophile or a person with pedophilia?

A. I was not involved in the writing of the RFP, okay. I was asked to put the program together after the

RFP was already done. In terms of the people who developed that program, I mean, we had mental health professionals involved in developing that program but in terms of my knowledge, I can't say that.

Q. What's your – let me back up a minute. Your degree, sir, is a masters level in nursing?

A. Health care administration.

Q. Health care administration, okay. Other than your BSN have you done any other, pardon me, had any other education in the field of nursing?

A. Nursing?

Q. Uh-huh.

A. Continuing education, you know, I can't, those kinds of things. In terms of formal college, no, I – my [p. 68] BSN in nursing and I have my Master's in Health Care Administration.

Q. Has any of that continuing education dealt with the treatment of sexually violent offenders?

A. No.

Q. In anticipation of being the program director of this sexual predator treatment facility, have you done any studies to determine whether or not, or determine what the success rate for such treatment facility is?

MR. PUNTCH: Well, Judge, I'm going to object to the form of the question. It calls clearly for hearsay on the part of Mr. Davis, and in addition it's outside the scope of my direct examination. Thirdly, there – he's laid

no foundation that Mr. Davis is qualified to give such an opinion.

THE COURT: Give me your question again, Mr. Weilert.

MR. WEILERT: I think my question was whether he'd done any study to determine the successfulness of any treatment programs.

MR. PUNTCH: Well –

MR. WEILERT: For sexually violent predators.

[p. 69] MR. PUNTCH: That was my next objection.

THE COURT: Let me develop that.

MR. WEILERT: Your Honor, the relevancy is that we're talking about a statute which is, according to the Legislature's Preamble, aimed at treating persons who have some personality disorders or mentally, mental abnormality and, excuse me, if such treatment is not recognized in the scientific community of those providing the treatment then that in effect takes away the treatment purpose of the statute and makes it penal and that's relevant to the question of whether or not these gentlemen have to talk during an evaluation.

THE COURT: Mr. Puntch?

MR. PUNTCH: Well in response, Your Honor, two things. One, I renew my previous objections – this witness, clearly by his previous testimony is not qualified to give an answer and such answer would be clearly hearsay. Second, Your Honor, the statute provides treatment of sexually violent predators doesn't promise a

cure; I don't know that anyone can. It provides appropriate treatment to – to the end that they will be able to manage whatever their sexually predatory nature is and an answer from this witness clearly at this point, Your Honor, [p. 70] would be not only my – my previous objections but I don't understand his competency to answer at this point and irrelevant.

THE COURT: You are the program director?

THE WITNESS: Yes, sir, I'm – that means I'm the administrator.

THE COURT: You're the administrator. The proposals, I have had the opportunity to read it, the proposals cover treatment programs, isn't that what the provider will contract for?

THE WITNESS: It provides framework, yes, sir.

THE COURT: Framework for it. In setting out the treatment program in your proposal, has – have you or SRS relied upon the professional people and psychiatry in that area and mental health to put the treatment together?

THE WITNESS: Yes, sir.

THE COURT: Yeah, I think – I don't think this witness is competent to answer this question, I think you need somebody else. I'll sustain the objection.

Q. (By Mr. Weilert) Mr. Davis, you spoke about a – another facility that I don't – I think you said is in the planning stage where sexually violent [p. 71] predators would be housed at some later point in time?

A. Yes.

Q. What – what kind of time frame are we looking at there?

A. It's – it's in the planning stage right now, I mean, I couldn't give you an idea.

Q. Would it be fair to say that in your experience in the Department of Social and Rehabilitation Services that that could be anywhere from this next year to never?

A. Oh, probably be a couple years, yeah.

Q. Do – does the program have any proposed length of treatment in mind?

A. It's behavioral outcome in nature.

Q. Are you familiar with any programs that are successful – are successful in modifying behavioral outcomes on an involuntary commitment basis, dealing with sexual predators?

A. Oh, dealing with sexual predators, I can't speak to that.

Q. In doing the planning of this program, have you spoken to anyone, any of your advisors in the area of psychology or psychiatry who point to any reasonable, pardon me, to any study where behavioral [p. 72] outcomes of involuntarily committed sexual predators have been changed?

MR. PUNTCH: Excuse me, before he answers, Your Honor, I wish to raise the same objections I raised earlier with the additional objection it's clearly calling for

hearsay, what somebody told him or some other study said.

THE COURT: Well, Mr. Weilert, I'm concerned that his professional background, he's an administrator, and these questions go more to professional people in the – in the area of mental health and psychiatry and so on and seems to me that we're going to go far afield by getting him to discuss whether he had discussed this matter with other professional people or whether any studies have been made. I think it's outside the reality of this witness' expertise.

MR. WEILERT: If I might just put something on the record.

THE COURT: Sure, no.

MR. WEILERT: Not in argument.

THE COURT: No, go ahead.

MR. WEILERT: Mr. Davis has told us that he is going to be the program director for this sexually violent predator unit and it seems probably [p. 73] that the program director would have examined the possible success of that program with mental health professionals and apparently according to his answer, he hasn't done that. The fact that he, pardon me. The fact that the program director does not have any information concerning whether or not such a program is successful in treatment is once again, in our opinion, a consideration that this is in fact a quasi-criminal commitment where there is no reasonable anticipation of a "cure." That's all I had.

MR. PUNTCH: Well, in response to that statement, Your Honor, again, I wish – I should have made

this objection earlier, there has been a legislative finding that sexual predators are in need of treatment in something other than a prison setting, that they need different treatment modalities and that they need long term treatment, so I think counsel's objection's already been addressed by legislative findings in Senate Bill 525 itself, Your Honor.

THE COURT: Well, the objection will still be sustained, but counsel made the record, sure, go ahead.

MR. WEILERT: Thank you, Your Honor.

[p. 74] Q. (By Mr. Weilert) Mr. Davis, this proposal that you identified earlier are, the – I think it's Exhibit A, is that –

THE COURT: One.

Q. (By Mr. Weilert) Exhibit 1, am I correct that you don't have any idea about whether the treatment proposals set forth in that are geared towards a successful treatment of sexually violent predators?

A. The Request For Proposal was written by people who have knowledge of the specification of treating persons with sexual problems. Okay, my job is to make sure that those proposals that we received met the criteria set forth in those.

Q. How are you in a position to judge whether the proposals you've received meet those criteria if you have no knowledge concerning the treatment?

A. Because RFP is written with very objective terms in it, like the qualifications of the staff, okay, cognitive therapy, those kind of things.

Q. Now, do you have a copy of that in front of you?

A. The RFP?

Q. Yes.

A. No, I don't.

THE COURT: He has one right there.

Q. (By Mr. Weilert) Thank you. I'd like to refer you [p.75] to page two.

A. Okay.

Q. Pardon me, bottom of page one, section 10.2.3 and it says, you know, site primary mental health treatment professionals must be at least masster [sic] level psychologist, master's level social worker or master's level psychiatric nurses?

A. Uh-huh.

Q. Treatment professionals should have course work and documented 200 hours (one year).

THE COURT: 2,000.

Q. Pardon me. 2,000 hours' direct clinical working on a sex offender treatment or plan to obtain such course work and or experience. Now, am I correct that that calls for someone who has no experience but says I'm going to get it, all the way up to someone who has in fact 2,000 hours of experience?

A. I can answer the question this way, the specification individuals that were identified, that were named in the proposals, were submitted to us, had experience in sexual treatment programs.

Q. Okay. That – I don't think was my question. The proposal calls for someone with either no experience all the way up to over 2,000 hours; is that correct?

A. Okay, right.

[p. 76] Q. Now, would you agree that someone with no experience is, objectively speaking, someone with no experience not as qualified as perhaps someone with 2,000 hours of experience?

A. Sure.

MR. PUNTCH: Before this, excuse me, the witness has already answered. If you would give me a chance to make an objection, please.

Q. (By Mr. Weilert) So when you say non-professional, pardon me, under Section 10.2.4, non-professional support staff must meet educational requirements to fulfill their assigned duties; is there anything in there that sets forth what their duties are or their educational requirements are other than that section?

A. Yeah, the job description that I've written.

Q. Okay, where's that?

A. In my office.

Q. Okay. That's not in the proposal?

A. No, we're supplying the direct care staff.

Q. Going to the program description, you say that each proposed program shall, under Section 11.1.1, state the theoretical basis for the program, the treatment strategies, the performance indicators, program goals, evaluation tools and other data and or [p. 77] materials available which provide information necessary for evaluating the

proposal. Do you have anything, sir, which sets out objective standards that these theoretical bases for the treatment programs, treatment stratagies [sic] must meet?

A. I'm having trouble concentrating on this, I guess I'm a little flustered being up here.

THE COURT: That's all right.

THE WITNESS: I don't know.

THE COURT: Counsel, why don't we just take about a 15-minute recess anyway. I think it might be a good time.

(At this time a recess was taken, and the following proceedings were reported of record by Connie Uphaus and is contained in a separate file.)

---

* * *

[p. 14] D.O.C. inmates and patients under S.R.S.?

A We are planning not to, no. I have been meeting with the warden at Larned Correctional. In fact, yesterday I was there, so we can establish how we are going to vary the times so they won't be intermingled any more than necessary. In terms of eating, you cited they will be accompanied by S.R.S. staff and eat in a separate part of the dining room, separate from the inmates.

THE COURT: Okay. Counsel, I may have opened something you want to follow through on. Go ahead.

MR. PUNTCH: No, Your Honor.

MR. WEILERT: It is the same dining room?

A Yes.

THE COURT: If he needs to leave, is there any problem with him leaving if he needs to?

MR. PUNTCH: No, Your Honor.

THE COURT: Thank you, sir.

MR. PUNTCH: Mr. Cummings, Your Honor.

WILLIAM CUMMINGS,

called as a witness on behalf of the Petitioner, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PUNTCH:

[p. 15] Q Tell us your name for the record?

A William Cummings.

Q Mr. Cummings, what do you do for a living?

A I am with Kansas Department of Corrections with Central Office.

Q And what is your job title?

A Corrections manager, risk management.

Q What does that include? What do you do?

A Well, it encompasses a broad range of the issues including resolution of inmate complaints, appellate

review of inmates' disciplinary action, review resolution of complaints issued by families, employees, employee grievances, manage the furlough program, transportation program. I was asked to assist in developing the Department's participation in the sexual predator program.

Q And you are familiar to that extent, at least, of your participation with the Department and the sexually violent predator treatment program?

A Yes.

Q And as a result of the myriad job duties which you have, have you had to become familiar with all of the correctional institutions under the Department of Corrections here in the State of Kansas?

A Yes.

[p. 16] Q Would that include in addition the Correctional Facility at Larned?

A Yes.

Q What is the Correctional Facility at Larned?

A A correctional facility that is geared to address the mental health needs for the needs of those inmates that have need of intensive mental health treatment.

Q Is the facility there at Larned different from your other operations?

A Yes. The program there is geared toward mental health treatment.

Q How about the facility, the natural physical facility in the hospital at Larned, have you ever been there?

A To the correctional facility?

Q Right.

A Yes.

Q Have you seen the wards there at the correctional facility?

A Yes.

Q How do the wards there at correctional facility compare with, say, medium security prison. Are they any different?

A Not greatly. There's sleeping rooms and day rooms. In terms of a medium security facility, at most of our medium security facilities, the inmates don't have [p. 17] individual rooms, don't have individual sleeping rooms. At the mental health facility, they do. At one medium facility at Lansing, they do have individual sleeping rooms. Other than that, they don't. The rooms are obviously lockable at Larned. They have very, very nice day room facilities available right there within the housing areas, very spacious, providing inmates with an opportunity for interaction.

Q You were here when Mr. Terry Davis testified, weren't you?

A Yes.

Q And remember when he listed some specific rights that people committed under the mental health statutes have; do you recall that?

A Yes.

Q The very first one was the right to wear your own clothes?

A Yes.

Q When you are committed to the Department of Corrections and you are in a Department of Corrections facility, you get to wear your own clothes?

A No. I might make an exception to that. At a work release facility where obviously the program slant specifically would require that at a work release [p. 18] facility where the inmate actually works in the community, but in the facility of the CMR custody classification, it would not be allowed to.

Q Let's try to compare apples with apples, the same place security classification as psychological there at Larned?

A Like Larned Correctional Mental Health Facility?

Q Right.

A They are not permitted to wear their own clothing.

Q Are they permitted to have their own money?

A They are not permitted to carry money at all. They have limited access to limited funds to purchase limited items within the commissary, very limited items at the commissary.

Q Would they be able at a security facility similar to Larned Hospital to be able to order a tie from the Land's End Catalog?

A No.

Q Of the other rights that Mr. Davis talked about, do you notice the differences between rights of people who are committed under the statute for commitment of mentally ill persons and people who are sent to prison; any others that stuck out in your mind that he discussed?

A Yes.

[p. 19] Q Can you tell what those are? Well, I think the problem that probably stands out in my mind the most, correct me if I am wrong, if there was a prohibition on doing work, involuntarily performing work?

A Yes.

Q Yes?

A Compulsory work program is basic part of correctional treatment program. Kansas Administrative Regulation 44-12-401 requires that an inmate perform whatever work he is assigned to.

Q Any others that you recall now that stick out in your mind?

A I believe that the patient can receive sealed – can send and receive sealed letters. I believe that was part of that.

Q How does that work in the penitentiary?

A Well, any inmate mail except legal mail and official mail can be opened and read, opened, searched and read, opened and searched at any time, read with the consent of the warden. Official mail or legal mail, that is any mail that's from an attorney or from any other person

with whom the inmate would have a right to private consultation, would be opened and searched in the inmate's presence, but certainly would not be given to them sealed. In addition, he can search any [p. 20] mail that is found to fall within our guidelines for censorship.

Q What about personal property, any limitations on personal property that an inmate in prison can have?

A We have a list of property that inmates are permitted to have and that list we view as being relatively conservative in comparison even to other correctional systems.

Q What about daily visitation for people in prison, are they allowed daily visitation with people?

A No. Normally at most correctional facilities, I am thinking it's in the range of a half day during the week and a half day on the weekend or possibly a day, an all-day visit if they get approval in advance for visitors coming from a particularly long distance. In some of the work-related facilities, they are not permitted visits during the week because they are required to work during the week and not allowed to leave the work site to go to a visit. The compulsory work program would take precedence over a visit during that time period.

Q Do people in prison have a right to a furlough? You say you deal with furloughs?

A Yes.

Q Is there a right to furlough in prison?

[p. 21] A No.

Q When is a furlough given? How do you give furloughs?

A Could you run that by me again?

Q If it's not a right, you can't walk in and demand a furlough; how can you get one?

A We have a policy that controls the conditions under which an inmate may apply for a furlough, and those conditions are very restrictive in terms of the inmate. The inmate must be minimum security status. The inmates, if they are convicted of certain violent offenses, they must have met with the parole board at least once. They must demonstrate that they have a sponsor. The sponsor is thoroughly investigated to assure that the sponsor is appropriately responsible. We contact the district attorney's office, the sheriff's department, the police department, to see if there are any objections to granting a furlough. The victim, if it's a violent offense, the victim is given an opportunity to comment. And if after all of these hurdles, if the warden approves that, then it is submitted to the Kansas Department of Corrections central office where I stand in final judgment.

Q Are you required to give anybody a furlough?

A No.

Q It is a matter of privilege, not a right?

[p. 22] A Absolutely.

Q And for any furlough that's granted, are you required to assess the risk involved in releasing that person on furlough?

A Yes. We do a thorough review of all records that are relevant.

MR. PUNTCH: There is nothing further.

THE COURT: Cross please.

CROSS-EXAMINATION

MR. GREENO:

Q Mr. Cummings, what's been your involvement in this particular senate bill, can you expound on that a little bit? What was your particular involvement with the Department of Corrections on this particular bill?

A Participated in – primarily participated in meetings with Department Secretary facility management and the other agencies that were – and the other agencies that participated or that had been involved in this process, and primarily we had been looking at process that in the future will be used to assess the process by which we will notify the county attorneys of the inmates that are being released that fall within the purview of the statute.

Q Were you involved in the Secretary or the Department of Corrections' participation and implementation of [p. 23] this particular program or things that are going to affect the Department of Corrections as far as implementation of senate bill, i.e.? Let me be more specific?

A Yeah.

Q When you were notified or Department of Corrections was notified that these actions had been filed here in Sedgwick County and there was going to have to

be evaluations conducted, these people were still technically under the custody of the Department of Corrections; is that correct?

A That is correct.

Q Did you participate or help in the decision-making process of where they were going to be evaluated and what circumstances were going to surround that evaluation?

A No. At that point, no, I wasn't.

Q So when they left here and went to Larned State Hospital for the evaluation, the Department of Corrections had nothing to do with it?

A That is correct.

Q What procedure was used or if you are familiar with the Department of Corrections relinquishing control and custody of these other individuals for that period of time, was it a formal agreement?

[p. 24] A I don't believe I can answer that question.

Q Would somebody in the Department of Corrections know the answer to that?

A I believe they would, yes.

Q Who would that be?

A I think I would have to refer to legal counsel.

MR. PUNTCH: I will object to relevance of the question for purposes of this hearing. It sounds like discovery to me.

THE COURT: I will allow it.

A I think I would refer it to our chief legal counsel, Tim Madden, in terms of the exact procedure.

Q Now, the Department of Corrections has many different custody levels; is that correct?

A Yes.

Q Ranges from maximum to minimum?

A Yes.

Q And if I understand, you compared the facility at Larned that the Department of Corrections has, you compared that to a medium security; is that correct?

A No.

Q How could you characterize that?

A Maximum.

Q And in that maximum setting, what makes it a maximum setting?

[p. 25] A Primarily the exterior, perimeter and the internal movement controls. The inmates are secured in their cells or can be secured in their cells when they are not actually participating in a treatment program and they are secured in an individual cell.

Q But they also have access to recreational programs like baseball diamonds and weight rooms?

A Under supervision, yes.

Q Under supervision, okay. They go to the dining hall, et cetera, et cetera?

A Under supervision.

MR. PUNTCH: Excuse me, I object to the form of the question because I am not sure what et cetera, et cetera means.

MR. GREENO: That's okay. I will withdraw that portion of my question. Okay.

THE COURT: Fair enough.

Q Now, then the perimeter security that you talked about that also makes this a maximum security facility, that's the same perimeter that will be in effect when that particular person becomes a part of the sexual predator treatment program?

A That is correct.

Q Now, the Department of Corrections has a sex offender treatment program; is that correct?

[p. 26] A Yes, we do.

Q And you would term that as – well, tell me what kind of program is it?

A Well, it is a sex offender treatment program and it lasts approximately a year. In terms of characterizing the specific modes of treatment, I am not qualified.

Q This morning when we were talking to you, you called it intensive treatment?

A That is primarily their focus of their day's activity, inmate's activity. When in speaking in terms of intensive program, it's not something like I go to for an hour in the afternoon or in lieu, in addition to a lot of other

activity. That becomes primarily the focus of their activity.

Q Those sexual offender treatment programs that you have that last for a year, are they all in maximum security facilities?

A No.

Q Are any of them in maximum security facility?

A Yes. One is at Hutchinson Correctional Facility.

Q How many of them are in medium security facilities?

A I don't believe any of them. I think we have one.

Q Do you have any at minimum?

A Yes.

[p. 27] Q How many?

A One.

Q So you have one in maximum and one in a minimum?

A Yes.

Q And that's all?

A To my knowledge, yes.

Q People that go to those sexual offender programs, are they the people that are convicted of sexually violent crimes as per the Senate Bill 525?

A As set forth – well, that would be a prime consideration in someone being referred to that.

Q People that have committed those kind of crimes that are mentioned in the senate bill, are you familiar with that portion of the bill?

A Yes.

Q They sometimes receive minimum custody; is that correct?

A Yes.

Q They sometimes receive work release; is that correct?

A Yes.

Q So while they are in custody of the Secretary of Corrections, they are able to go outside the walls of the penitentiary; is that correct?

A Sometimes.

MR. PUNTCH: I wish to raise the objection of [p. 28] relevance; what happens to them in the custody of the Secretary of Corrections.

THE COURT: What do you say, Mr. Greeno?

MR. GREENO: What we are talking about here is whether or not the statute is penal or civil commitment, and the statute particularly talks about the needs for secure environment for the treatment of these particular individuals. When these particular individuals are in a less-restrictive setting prior to the commitment under this particular civil statute, their access – they have more rights or more liberties than they would have under this

particular statute. It is deemed appropriate by the Secretary of Corrections to let them have these particular liberties, but when it is found they are sexual predators under the statute, no, sir, liberties are curtailed and it becomes penal in that nature. And if it is not necessary for this type of restriction to curtail their criminal activity, then it is in fact penal.

THE COURT: But the Legislature has distinguished these two classes, and what you have lumped in your question with Mr. Cummings, you are talking about those individuals who are confined under D.O.C., and they have been convicted of a sexual [p. 29] offense, rape or molestation, whatever, and they may not be the same ones that we are talking about here. They may be coincidentally, but it has not been determined yet that these are, these people you are referring to, are considered quote within this S.B. 525, sexually violent predators. I would have to sustain the objection because they are being treated differently because they are in a different category. They are under D.O.C. commitment. They are actually under court commitment as I understand there, and here we are talking about S.B. 525 moving them into, at least from what the bill says, into a treatment mode. I think you are lumping. I would sustain the objection. You are lumping too many all these people that are confined into a category of sexually violent predators and that's not the case here at all, at least from what I understand. Try it again.

MR. GREENO: I will step back.

Q You understand we are talking about people who have been convicted and in the custody of Secretary of

Corrections as sexually violent crimes in Senate Bill 525; do you understand that part?

A Yes.

Q And under the Sexual Predators Act or 525, there's another component, whether or not these people suffer [p. 30] from a mental abnormality or personality disorder?

A Uh-huh.

Q Do you understand that portion?

A Yeah.

Q The Secretary of Corrections or the Department of Corrections has mental health components that work with sexual offenders; is that correct?

A That is correct.

Q And that component, that treatment program is to treat people who have sexual deviant problems; is that correct?

A Yes.

Q And would it be a fair statement to say that a large portion of those people may suffer from a mental abnormality as contemplated by that particular statute?

MR. PUNTCH: Before you answer, let's get foundation for him to testify to that.

THE COURT: Yes.

Q What do you know about the sexual offender treatment program with Department of Corrections?

A Basically that it is a year program that becomes a primary focus of the inmate's activity. It's a long term. It's available in those locations. In terms of specifications of the program, again I am not [p. 31] qualified to talk about the specific treatment modes or exactly what it is they are doing.

Q Are you qualified to tell us about which individuals are targeted for those particular programs?

A In terms of referral to the program or assignment?

Q Referral to the program?

A In terms of referral to the program, it is an issue that's taken up at reception and diagnostic unit, it becomes a part of their program agreement. And again certainly conviction of sexually violent offense is a strong recommendation, but there are other issues that play into that, including length of time the inmate has to serve and so forth.

Q The reception and diagnostic center you mentioned, and that is part of the process of being referred to this program; is that correct?

A To the sex offender treatment program within the Department?

Q Yes.

A Yes.

Q That facility, as I understand it, is a psychological arm or component of the Department?

A It is an evaluation unit.

Q And they do psychological evaluations there; is that correct?

[p. 32] A Yes.

Q The inmates when they go through that, they see social workers?

A Yes.

Q And they see psychologists?

A Yes.

Q And sometimes see psychiatrists?

A Sometimes.

Q And those particular people, when they see them, they do psychological tests?

A They do testing, yes.

Q They do staffings of the people that have interviewed and done the testing, those people will get together and make a recommendation?

MR. PUNTCH: Your Honor, I will object to this line of questioning. What's the relevancy of what happens?

MR. GREENO: We are talking about the other components of Senate Bill 525, whether they suffer from mental abnormalities. My contention is if they go to a facility designated by Department of Corrections to be questioned by psychologists or a social worker and psychiatrist and make a recommendation for sexual offender, an inference can be made the mental abnormality is as broad as that [p. 33] word is.

THE COURT: The Court can't make that jump for you, what you are talking about. Those – again, those inmates have been convicted of sexual offenses and diagnostically they are sent into a program so that they can get some treatment, but there's no showing at that point of whether this witness would be able to have the expertise to show about the violent offenders you are talking about. He has not been, at least at that point this witness is not capable. They have not been ascertained as falling within the classification of Senate Bill 525 proposes. Those are different programs completely, different classes of people. At least at this point, been no diagnosis that these sexual offenders that Mr. Cummings has talked about are being designated – have been designated sexual violent predators. I will sustain the objection here. We are talking about apples and oranges.

Q Visitation at Larned that the Department of Corrections has, they have rulings; is that correct?

A Yes, but I am not familiar with them specifically. They do have a policy regarding visitation, but I am not specifically familiar with it.

Q So you don't know if that's the same that is in the [p. 34] rest of the other correctional facilities?

A It varies from facility to facility, undoubtedly different.

Q So they may have access to daily visitation and you are not aware of it?

MR. PUNTCH: Objection. They may have pie in the sky that he is not aware of either. It's irrelevant.

MR. GREENO: He testified that they have daily visits.

THE COURT: Well, he did say that. Well, I amplified it.

A Yeah.

Q Do you know that they don't have daily visitation at Larned Correctional Mental Health Facility?

A I haven't reviewed their specifics, but in general in the Department, no, daily visitation is not permitted.

Q You don't know for a fact they don't have it there, though?

A No, I don't.

Q Okay. Are they allowed to have any other items that the other correctional facilities are not allowed to have?

A Not that I am aware of.

Q You can't have radios?

[p. 35] A Yes, they can.

Q You can have TVs; is that correct?

A Yes, they can.

Q Are they allowed any subscriptions to any magazines?

A They are allowed to subscribe to magazines.

THE COURT: You are talking about D.O.C. people?

MR. GREENO: D.O.C. people.

THE COURT: They don't have a right to all magazines?

A They can have a subscription to –

THE COURT: Unless they changed it since I have been Secretary of Corrections, they are limited to the number of magazines they can have in their possession in terms of reducing fire warning.

THE COURT: Can they subscribe to Playboy and Blueboy?

A They can subject to censorship if they are found to be obscene.

THE COURT: Okay. Well, I want to make sure we understand what we are talking about when they ask you whether they are allowed to have magazines. They are, but they can't subscribe to all magazines because of regulation, if it is obscene material.

A Well, again, it is subject to censorship.

THE COURT: I wanted to make sure that's clear. [p. 36] All right.

Q On direct examination you painted a fairly restrictive environment as far as some of the liberties and what they can do as far as property they can own. Money. They can't have any money?

A In their possession, yeah.

Q But they can have money on the books?

A They can have, yeah, they can have money in an account that they can use at the facility canteen or to buy items from this limited list that the Department has.

Q This limited list, what is that?

A Set forth in our policies. I don't know the entire list off the top of my head.

Q What would someone not be able to buy that's not on the list?

A Well, articles of clothing primarily. The inmates have to wear institutional clothing. I think the example drawn previously was that they couldn't order a tie from Land's End Clothing. The electronic equipment is limited pretty much to the items you mentioned, radio or television. They obviously can't order in electronics equipment. It's again, that list is an inclusive list of all items that they can have, and anything off of that list is not permitted. And, again, our research of property showed that that's a [p. 37] conservative property policy and we believe it to be a conservative property policy.

Q Well, regardless of whether it is conservative by your standard or some other department standard, have you compared it to the policy of Secretary of Social and Rehabilitation Services in regard to mental patients?

A No, other than what Terry had told us today.

Q Were you aware that some of the inmates from the Department of Corrections that were brought in under this action were sent to Larned State Hospital?

A Yes.

Q And do you know where they were sent at Larned State Hospital?

A Yes. I was told it was the Jung Building.

Q And do you know what ward they were on?

A No.

Q Were you familiar with the security that was implemented?

A I have never seen it.

Q Did you get any information about who was going to look after them and whether or not they will be able to escape or anything like that?

A No, not personally.

Q Who provides the penal health counseling for the Department of Corrections at the Larned Correctional [p. 38] Mental Health Facility?

A I believe Prisoner Health Services.

Q How long have they been doing that?

A They got that contract in July.

Q Before that, did they do it as a subcontractor?

A I believe, yes.

Q And who did they work for?

A Consortium.

Q The Mental Health Consortium?

A Yes.

Q You heard the previous witnesses, the two people that had submitted bids for mental health treatment, did you hear that?

A Yes.

Q Is that the same Prison Health Services?

A I believe that is.

Q How many people with the Department of Corrections have been subjected to this statute so far that you know of?

MR. PUNTCH: What is the relevance of that question?

THE COURT: What is, counsel?

MR. GREENO: Well, I am curious. I am going back. I got to admit I am going back to where I was before. There's got to be some connection between the

* * *

DISTRICT COURT'S ORAL FINAL RULING THAT PROCEEDING IS CIVIL NOT CRIMINAL (TRANSCRIPT OF PROCEEDING OF 9/23/94)

[p. 69] that someone will do certain things in the future, whether it is likely that anyone committed under the statute will ever be released.

THE COURT: All right. Maybe then let's plan on 1:15. Give you more time to go over the material, too.

MS. FOULSTON: How about 1:30?

THE COURT: Any problem with 1:30? Let's recess till 1:30. And would the deputies have the respondents back here back at 1:30, please. Your Honor, there are several other topics and arguments to be made. The fact this is a violation of equal protection that the legislature has seen fit to target individuals who have only.

MR. WEILERT: Should we put on the record that Ms. Shaneyfelt had a 1:30 hearing of some sort, I think. And so we will be acting in her stead.

THE COURT: Okay. She mentioned that I think she's with Judge Helsel. She said it would just be a few seconds. Is it all right to proceed, though?

MR. WEILERT: Yes, sir.

THE COURT: All right. The respondents are brought into the courtroom at the present time. Let the record show counsel all present. Court is now ready to rule on the issues that have been presented to [p. 70] the Court. First of all, I certainly want to show my appreciation of both sides and the way we really moved on this fast track to get all these things before the Court. And there were a lot of issues which need to be resolved and

unfortunately if we had more time, perhaps maybe we could get into more in-depth matters, as far as how to resolve these issues. The other things I apologize that because of time restraint's gonna be almost impossible for me to prepare extensive findings of fact and conclusions of law so that in the event an appellate record is made that at least the appellate court would have more extensive findings. But because of the time restraints – And if my computation is correct that we have the forty-five days to be concerned about, which falls on the weekend of October 1, which means October 3 – But the Court is ready to rule. And I think the first thing I should rule upon, which takes care of a lot of the other issues – And that is the question of whether this proceeding is quasi criminal in nature. The Court has already ruled this proceeding is civil in nature. But the Court didn't allow respondents to present additional briefs, briefing on the issue of quasi criminal proceeding on the basis that if – not withstanding the Court's finding of a civil proceeding – if the environment of [p. 71] the persons involved in this statute is so punitive and that punishment is really the focus rather than the matter of treatment or an environment which is not aimed at punitive measures, that perhaps the Court should consider the matter that it is not civil in nature but more quasi criminal, which in essence would be criminal. The second point respondents made is that in reading the statute and then with the deposition of Dr. Befort(sp), which the Court read earlier, and the other contentions that are made by respondents, that in essence the statutory language does talk about treatment therapy programs. But in essence if anything it's just a sham; that there is no treatment program; that if

there is any kind of a program, it's ineffective. There's not enough reliability in the sense of that these people, assuming they have this diagnosis such as the sexual violent predator, that really they're gonna be able to be treated fully. And therefore actually what we're doing by the statute is just warehousing these people. In essence that's the gist of it, although it's more detailed than that. The Court has considered this and finds that the respondents have not sustained the burden to show this is quasi criminal or criminal in nature. The earlier finding that it is civil in nature still holds. And to [p. 72] support that finding, the Court did review the testimony which was presented last week with Mr. Adams, Mr. Cummings; Mr. Adams being with S.R.S.; Mr. Cummings being with with D.O.C. And the Court reviewed the testimony concerning the environment; and the Court is satisfied that there's a clear separation, clear distinction between the inmates under the Department of Corrections and these persons under the jurisdiction of the S.R.S., and the fact that these persons under this statute are confined in a prison setting, whereas Larned is part of the D.O.C. facility, that in itself doesn't make this procedure constituting a punishment focus or punishment aspect. When I look at all the other things, the differences between the rights of the these parties, these persons under S.R.S., their personal rights are different. They are in a different classification than the prisoners under the D.O.C.; that the only relationship involved in the D.O.C. is the security that's provided; but that too doesn't take it out of the civil proceeding in nature, where they have no involvement whatsoever in any treatment program. The Court feels that it is civil in nature and that the respondents have

failed to satisfy the Court in regard to the matter of whether it is or is not quasi criminal. With that finding, then, the Court [p. 73] feels that the civil procedure applies in the matter of discovery. And although discovery provisions under the code, such as endorsement of witnesses, exchange of witnesses, exchange of expert reports, are all involved and will be applicable in essence because the Court finds on the basis of its civil nature this proceeding is there is no privilege against self-incrimination. There is no privilege as far as the physician-patient under 60-427, nor under the certified psychologist privilege under 74-5323, nor the privilege concerning care and treatment facilitates under 65-5602. The Court further finds on the basis of its ruling, this is civil in nature, that due process question's raised, such as double jeopardy, vagueness and overbreadth of the statute, the denial of equal protection, the claim of ex post facto, Bill of Attainder, the privilege against self-incrimination, the Court finds none of these are involved because it is of a civil nature; and that there is sufficient protection under the substantive as well as procedural due process that the statute – Without me repeating it, the statute sets out the procedural due process concerning the treatment program, the right to come back in for hearings to determine whether or not the person is any – is no longer a danger to himself or to society. The equal [p. 74] protection argument is denied in the sense this Court finds that there is a separate, distinct classification of those persons who have been convicted of violent sexual offenses; in this case, those that are under this statute sexual violent predators are separately situated as far as any combined – whereby they should be treated the same way. There is a

distinction here in these situations. The Court further reviewed Dr. Beckfort's deposition, particularly as he referred to pages 612 concerning the problem which follows. This really is not a treatment program, no matter what the statute says; and the Court is aware from just general experience that predicting future behaviors and predicting cases of this nature that we're talking about that there is a split of opinion, differences as to the prognosis. But the Court is satisfied from the case that just because of that – does not make it inadmissible evidence as to what is the objective and the purpose this statute. So at this point the Court will make no finding that there is no reliable criteria in this case to decide that in essence there is no valid constitutional treatment program. In essence, obviously, as I said earlier, this is gonna be a conclusion that has to be reached somewhere along the way after the testimony is presented. As counsel well

* * *

TRANSCRIPT OF PROCEEDINGS OF OCTOBER 3-5, 1994 (JURY TRIAL)

[p. 204] MS. FOULSTON: State calls Leroy V. Hendricks.

LEROY HENDRICKS called as a witness, having been first duly affirmed, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Please state your name for the Court.

A. Leroy Hendricks.

Q. Mr. Hendricks, I'm going to ask if you could move that microphone closer to you, sir, so that we can hear you. I note, sir, that you wear a hearing aid. Is that correct?

A. Yes.

Q. If at any time you have difficulty in hearing my question, would you please let me know?

A. Yes, I will.

Q. Can you hear me okay?

A. Yeah.

Q. Thank you. Mr. Hendricks, you are fifty-nine years of age?

A. I am sixty.

Q. You are sixty now. When was your birthday?

A. 27th of September.

Q. Of what month?

A. Of September.

Q. So you have just only recently turned sixty?

[p. 205] A. Yes.

Q. Where were you born, sir?

A. Melbank (sp), South Dakota.

Q. And who are your parents?

A. Violet Hendricks and James Hendricks.

Q. And are they still living?

A. My mother is.

Q. And her name is now?

A. Violet Toolastra (sp).

Q. Where does she live?

A. Hiawatha.

Q. Do you have any brothers or sisters?

A. I've got two brothers.

Q. And were those the only children that were born of the union of your parents?

A. No, I had an older brother that died in 1974, I believe.

Q. And your other two brothers?

A. They're still alive.

Q. In terms of your family history, what number were you in birth order?

A. Number three.

Q. Do you report that you had a normal childhood?

A. I would call it consider it that.

Q. And did you have any abnormal sexual urges as a child, say, before the age of thirteen?

[p. 206] A. Not that I can recall.

Q. Can you recall the relationship that you had with your mother?

A. Normal. We still have a good relationship.

Q. And was part of the normal relationship with your mother her desire to raise you as a girl?

A. Yeah, she tried.

Q. And you consider that to be normal that your mother wished to raise you as a girl child?

A. It happened in other families same time we was there.

Q. And was there any indication by your mother that she wished to have you castrated?

A. No.

Q. Did your mother wish to have you wear girls' clothing?

A. At times up until I was about five.

Q. Did she have you or wish to have you wear bras at a later point in your live [sic]?

A. Yes.

Q. And this is all included within what you consider to be your normal childhood?

A. Yes.

Q. Was any other conduct of this nature directed at your three other brothers?

A. No.

Q. You left home when you were a teen-ager. Is that [p. 207] correct?

A. Yes, ma'am.

Q. Approximately seventeen?

A. Seventeen.

Q. And where did you go?

A. United States Air Force.

Q. What rank did you hold?

A. Airman second.

Q. How did you end up at the McConnell Air Base. Were you assigned here?

A. I was assigned here.

Q. What age were you at that time?

A. Seventeen.

Q. Now, Mr. Hendricks, before you left home at the age of seventeen, had you engaged in any sexual behavior?

A. I don't recall.

Q. Did you have any relationship with a niece at the age?

A. Yes.

Q. When you were fifteen?

A. No, that would have been a cousin when I was, I think, four or five, if I remember right.

Q. She was four or five?

A. I was four or five.

Q. And your the cousin was what age?

A. Oh, I don't remember, ma'am. She had to have been a [p. 208] teen-ager.

Q. Sir, are you suggesting that you were four or five; and your cousin was fifteen?

A. Yes.

Q. As opposed to the fact that you started when you were fifteen; and your cousin was younger?

A. I don't have any cousins that was – that was anywhere near when I was a child.

Q. What did this sexual behavior consist of?

A. Her fondling me.

Q. Was there any other sexual activity that you had before the age of seventeen that you recall?

A. Not that I can recall.

Q. Was there any sexual activity with your mother – father?

A. No.

Q. What about with your mother?

A. No.

Q. Did you believe that there was anything different about yourself in terms of sexuality at the time of your being in the age group of about seventeen?

A. Other than I was shy; I was afraid of girls.

Q. Did you find yourself attracted to children at that age?

A. No.

Q. Was it at a later age that you first became attracted to children?

[p. 209] A. Yes.

Q. And directing your attention to your stay here at McConnell Air Force Base, how long were you in this community at that time?

A. Oh, I was – I come here in '52, and I left McConnell in '56.

Q. And was there a time that you were discharged from the service?

A. Yes.

Q. And were you discharged from the service dishonorably?

A. No, I was not.

Q. It was an honorable discharge?

A. I had an honorable discharge under undesirable conditions.

Q. And the undesirable conditions were the fact that you had been convicted in municipal court here in our city of exposing yourself to two little girls. Is that correct?

A. Yes.

Q. I'm going to show you a photo marked January 12th, 1956. Can you identify the person in this photograph?

A. Yes, that's myself.

MS. FOULSTON: For reference, that has been marked State's Exhibit Number Seven.

BY MS. FOULSTON:

Q. The circumstances surrounding the taking of this [p. 210] photograph involved an incident back in 1955 when you approached two girls. Is that correct?

A. Correct.

Q. And you were attracted to those two girls, weren't you?

A. Yes, ma'am.

Q. And you exposed your genital organs to the two girls?

A. Yes.

Q. Is that correct? And you invited them to enter the vehicle with you, did you not?

A. I don't remember that, no.

Q. And you had a desire sexually for the little girls, didn't you?

A. Only to expose, I think, at that time.

Q. You were convicted by plea on January 13th, 1956. Is that correct?

A. I believe so.

Q. And you were fined $2.90. Is that right?

A. I don't remember the fine, no, ma'am.

Q. I'm going to hand you Petitioner's Exhibit Number One from Municipal Court of the City of Wichita, showing a plea of guilty to the charge of indecent exposure and ask if you recall ever seeing a document of that nature?

A. No, ma'am, I do not.

Q. You took no care and treatment of a psychiatric or psychological nature as a result of your conviction for [p. 211] exposing yourself to the two young girls, did you?

A. No.

Q. You were discharged from the service and left the area of Wichita. Is that correct?

A. No, I stayed in Wichita until 1958.

Q. Did you expose yourself to any other children between the time of your conviction and the time of your leaving Wichita?

A. No.

Q. Were you attracted to any children during that time period?

A. No, ma'am.

Q. Did you have any urges to be involved with any children during that time period?

A. I can't recall. That it's been too far away.

Q. When you left the City of Wichita, where did you go?

A. Cedar Rapids, Iowa.

Q. And what happened in Cedar Rapids, Iowa?

A. I was arrested for lewdness.

Q. Tell us what happened.

A. That was a strip poker game that there was a fourteen-year-old girl there. We didn't realize she was fourteen. And I was arrested and given six months.

Q. I can't hear you, sir.

A. I was arrested and given six months.

Q. Did you serve any time as a result of that?

[p. 212] A. Just six months in the county jail.

Q. Did you take any treatment as a result of that?

A. No.

Q. Did you change your behavior as a result of that arrest?

A. Yes.

Q. When you changed your behavior, did you also change your environment to Spokane, Washington?

A. Yes.

Q. Do you recall what type of work you were doing in Spokane?

A. I was working for a carnival.

Q. Now, a carnival would be where children would come. Is that correct?

A. Yes.

Q. And did you have children – contact with children on a regular basis?

A. No.

Q. Did you have sexual desires towards children?

A. Yes.

Q. Did you have any normal adult sexual relationships with anybody of the opposite sex?

A. Oh, yes.

Q. What was your marital status?

A. At that time we was separated.

Q. And you had been married, had you not?

[p. 213] A. Yes.

Q. And as a result of your exposing yourself to the young girls in Wichita, your marriage had some difficulties, didn't it?

A. No, ma'am. It was not that.

Q. You had some children, did you not?

A. Yes.

Q. And by that marriage, those children – How many of them?

A. Two.

Q. And did you continue to be the father to those children and live in the home with them?

A. Run that by me again. What do you mean?

Q. Was there a time when the children were – left your home and went to live with someone else?

A. When I was in jail, yes.

Q. Now, directing your attention back to being a carnival worker, what did you do for the carnival?

A. I was a ride foreman.

Q. And that would be people – Kids would come on rides?

A. That would mean – Yes, but I didn't have anything to do with that.

Q. But, nevertheless, you did meet a seven-year-old boy and an eight-year-old boy at the carnival. Is that correct?

A. Yes.

Q. And that would be a Steven McPherson and David Erebeznic?

[p. 214] A. I don't remember the names.

Q. You don't remember their names, but do you remember the activity?

A. Vaguely. I can remember some of what happened, yes.

Q. Do you remember that vaguely something being that you molested those two boys?

A. Yes, ma'am, I do.

Q. And that in August of 1960, on the date this happened or sometime shortly thereafter, you were arrested for that, were you not?

A. Yes, I was.

Q. I'm going to show you State's Exhibit Number Eight and ask if you can identify the person in this photograph?

A. Looks like myself.

Q. And is this a photograph taken of you in 1960 in Spokane County Jail in Spokane, Washington?

A. Yes, ma'am.

Q. Is the photograph that was taken after you molested the two boys seven and eight years of age?

A. I believe it is.

Q. And you chose these two boys, did you not?

A. Yes.

Q. And you physically molested them?

A. Yes, ma'am.

Q. And you went to jail for it, did you not?

[p. 215] A. Yes, ma'am.

Q. You went to Walla Walla, Washington?

A. Yes, ma'am.

Q. To the penitentiary?

A. Yes, ma'am.

Q. And did you receive any treatment as a sexual offender in that penitentiary?

A. No, ma'am.

Q. Did you request any treatment?

A. No, ma'am.

Q. Did you believe you had a problem?

A. At that time, no, ma'am.

Q. Now, by this time you had had involvement with two boys, and two, three girls by this count within those years of 1956 through 1960. Is that correct?

A. Yes, ma'am.

Q. Were there any other children you had sexual contact with during this period of time that you were not caught?

A. No, ma'am.

A. You got released from Walla Walla. You got a twenty-year sentence; but you were released on November 13th of 1962. Isn't that correct?

A. That's right.

Q. And you left Spokane, Washington, didn't you?

A. Yes, ma'am.

[p. 216] Q. You went to Seattle?

A. Yes, ma'am.

Q. Did you have family in Seattle?

A. No, I lived there as a child.

Q. You wanted to get out of Spokane?

A. No, they sent me to the penitentiary. And from there Seattle accepted me on parole.

Q. So when you were on parole, you were supposed to abide by the law, weren't you?

A. Yes, ma'am.

Q. And they told you that if you didn't abide by the law that you would have to go back to the penitentiary, didn't you?

A. Yes, ma'am.

Q. And you knew that you would have to serve the remainder of your sentence, wouldn't you?

A. Yes, yes, ma'am.

Q. And you would have to do hard time?

A. Yes, ma'am.

Q. But the urge for sexual episodes with children got the better of you, didn't it?

A. Yes, ma'am.

Q. So in 1963, you were arrested again, were you not?

A. Yes, ma'am.

Q. And this time you had molested a seven-year-old girl, [p. 217] Constance Jacobson (sp). Isn't that right?

A. Yes, ma'am.

Q. You formed a relationship with her family, didn't you?

A. Yes, ma'am.

Q. And you came to know her by walking around the neighborhood and telling the parents that you were a friend of a neighbor. Is that correct?

A. No, ma'am.

Q. And you took this child, this seven-year-old child; and you engaged in illicit sexual activity with her?

A. Yes, ma'am.

Q. I'm going to hand you what's been marked for identification purposes as State's Exhibit Number Two. And this relates, backing up a little bit, to your conviction out of Spokane, Washington. Have you seen this document?

A. I don't remember seeing this, no, ma'am.

Q. You've seen a lot of legal papers, have you not?

A. Not too many, no, ma'am.

Q. Okay. Back to the Spokane conviction, you were convicted of the crime of indecent liberties with a child, Steven McPherson, and convicted of indecent liberties with a child, David Erebeznic?

A. Yes, ma'am.

Q. And that involved the fondling of two young boys in their genital area. Is that correct?

[p. 218] A. Yes, ma'am.

Q. Now, Constance Jacobson was a child that you molested within a very short period of time after being released from the penitentiary on parole?

A. Yes, ma'am.

Q. And you would take Constance with you on trips away from her home, would you not?

A. Yes, ma'am.

Q. And when you took her on these trips away from her home, you would molest her, wouldn't you?

A. Yes, ma'am.

Q. Tell us how you molested her.

A. Fondling.

Q. What did you do to her?

A. Fondle.

Q. Did you place your fingers into her vagina?

A. Slightly.

Q. Did you place your mouth or tongue on portions of her body?

A. No, ma'am.

Q. Did you think there was anything wrong with what you were doing?

A. I knew it was wrong at that point, yes, ma'am.

Q. Were you unable to control the urge to do that?

A. Yes, ma'am.

[p. 219] Q. Your sexual desires overwhelmed you?

A. Sometimes, yes, ma'am.

Q. Your sexual desires overwhelmed your understanding that you could go back to the penitentiary.

A. No, ma'am. I knew I could go back at any time.

Q. But you still molested the child?

A. Yes, ma'am.

Q. In August of 1963, after your arrest, on April 29th of 1963, you came before the Court there in King County, which is Seattle. Is that correct?

A. Correct.

Q. And you were found to be guilty of the indecent liberties with a child?

A. Yes, ma'am.

Q. And at that time the State filed a motion to temporarily commit you to the Western State Hospital. Is that right?

A. Correct.

Q. They wanted to see if you were a sexual deviant?

A. I assume so.

Q. And so you went to Western State Hospital?

A. Yes, ma'am.

Q. And you went there instead of going to the penitentiary?

A. Yes, ma'am.

Q. And when you got to Western State Hospital, they examined you, did they not?

[p. 220] A. Yes, ma'am.

Q. And they talked to you?

A. Yes, ma'am.

Q. And they tried to work with you?

A. Yes, ma'am.

Q. And they tried to treat you, did they not?

A. Yes, ma'am.

Q. What kind of treatment did you get?

A. Group therapy.

Q. Okay.

A. That was about it.

Q. Didn't help, did it?

A. No.

Q. You were found in April of 1964 to be a sexual psychopath. Is that correct?

A. I don't recall that, no, ma'am.

Q. If the records reflect that you were found to be a sexual psychopath, would you deny the record?

A. No.

Q. You were committed, then, for an indefinite period of time to Western State Hospital. Is that right?

A. I'm not sure it was indefinite, no.

Q. But they found that you were not safe to be at large at that time?

A. Yes.

[p. 221] Q. So they kept you there at Western?

A. Yes.

Q. And you continued in your group therapy?

A. Yes.

Q. Did they give you any medications?

A. No.

Q. The only physical problems you had, you had some difficulty with your hearing aids, did you not?

A. Yes.

Q. Getting batteries, et cetera. But generally no other medication was given to you?

A. No, ma'am.

Q. Regarding your sexual deviancy?

A. No, ma'am.

Q. Did you continue to have urges when you were in the Western State Hospital?

A. No, ma'am.

Q. There were no children there, were there?

A. There was children in the hospital, yes.

Q. You were allowed to have contact with the children?

A. Oh, yes.

Q. Did you molest any children in the hospital?

A. No, ma'am.

Q. In 1965, after spending that time in Western State Hospital, they said you were safe to be at large, didn't [p. 222] they?

A. Yes, ma'am.

Q. And they let you out, didn't they?

A. Yes, ma'am.

Q. And they let you out on the streets of Seattle?

A. Yes.

Q. And that would have been about January 14th, 1965, somewhere in the beginning of that year. Is that right?

A. Yes, ma'am.

Q. Going to show you what's been marked for identification purposes as Petitioner's Exhibit Number Three, the official documents from Washington, King County, Seatle [sic], that show your conviction for the crime of indecent liberties with a child, with Constance Jacobson, age seven, and the judgment and sentence of the Court, giving you a twenty-year sentence. You want to take a look at that.

A. No, I'll take – we aren't – we – We wasn't ever shown anything like that in the State of Washington. The courts would not show it to us.

Q. You knew you had been convicted? You just didn't have the official documents?

A. That's right.

Q. So there wasn't any question you were convicted?

A. Pardon?

Q. There wasn't any question but that you were convicted?

[p. 223] A. No.

Q. Now, you're back on the streets of Seatle [sic]; and you were working, were you not?

A. I was.

Q. And you were doing?

A. I was printing – working in a print shop.

Q. And you had a friend you had met in Western State Hospital, didn't you?

A. Yes, ma'am.

Q. A woman friend?

A. Yes.

Q. And you came to know some of her friends?

A. Yes, ma'am.

Q. Is that correct? And she had some friends that had two little children?

A. Yes, ma'am.

Q. Carol Ann, who was eight years of age and her brother, Richard, who was eleven. Is that right?

A. Yes, ma'am.

Q. So this is around the beginning of January 1967?

A. I don't recall the dates, no.

Q. If the records reflect that between January 2nd of 1967 through the 10th of March 1967, you engaged in carnal knowledge by mouth and tongue with an eight-year-old female child, would that help you refresh your recollection?

[p. 224] A. Yes, yes, ma'am.

Q. And these were children that you would take to the acquarium. Is that right?

A. I don't believe we ever went. Yeah, I might have, yes.

Q. You're gonna have to speak up, sir.

A. I says I might have. I don't recall.

Q. And you would take them away from their home. Is that correct?

A. Yes, ma'am.

Q. And you would perform acts of sexual deviancy on these children. Is that correct?

A. Yes, ma'am.

Q. And this was an eight-year-old girl. Is that right?

A. Yes, ma'am.

Q. And you would place your mouth into her vagina, would you not?

A. No, I would just kiss it.

Q. Kiss her?

A. Yes.

Q. Kiss her where?

A. Private parts.

Q. Are you speaking of her vagina?

A. Yes.

Q. Are you saying you didn't put your tongue into her vagina?

[p. 225] A. I don't remember, ma'am, if I did or not. If they say I did, I will go by what they said.

Q. Did you ejaculate on the children?

A. I don't remember.

Q. Did you place their penis in your mouth or the boy's penis in your mouth?

A. I don't remember that, ma'am.

Q. Did you ejaculate on the little boy?

A. No, ma'am.

Q. Did you fondle the little boy?

A. Yes, ma'am.

Q. And as a consequence, you were charged in 1967 with sodomy and with indecent liberties with a child. Is that correct?

A. Yes, ma'am.

Q. And I'm going to show you State's Exhibit Number Nine. Is this your photograph taken?

A. Yes, ma'am.

Q. In King County?

A. Yes, ma'am.

Q. At the time of your arrest?

A. Yes, ma'am.

Q. For the molestation of the two young children?

A. Yes, ma'am.

Q. You molested those children because you had a sexual [p. 226] urge, did you not?

A. Yes, ma'am.

Q. And you could not control your urges, could you?

A. I don't know. I didn't try.

Q. You didn't try?

A. That's right.

Q. You were in Western State Hospital, and you had taken sexual offender treatment. Is that correct?

A. That's correct.

Q. And you got out, and you sexually offended?

A. Yes, ma'am.

Q. You made a choice?

A. Yes, ma'am.

Q. And you acted on your choice?

A. Yes, ma'am.

Q. And you chose children?

A. Yes, ma'am.

Q. And you chose more than one children – multiples of children, did you not?

A. Yes, ma'am.

Q. This time, instead of sending you for care and treatment, they evaluated you first at Western State Hospital, didn't they?

A. Yes, ma'am.

Q. And you told them you weren't interested in being [p. 227] treated, were you?

A. You have to understand the circumstances on that.

Q. Can you answer my question, sir? You told them you did not wish to be treated?

A. Yes, ma'am.

Q. And as a result, you were resistive to treatment; and they sent you to the Shelton Penitentiary. Is that correct?

A. Yes, ma'am.

Q. And how long did you stay in the Shelton Penitentiary?

A. Oh, less than ninety days. That's like Topeka.

Q. And that's an evaluation center?

A. Yes, ma'am.

Q. And then you went to another penitentiary. Is that correct?

A. Yes, ma'am.

Q. And then did you return there to Walla Walla?

A. No, I went from Shelton to Walla Walla.

Q. Shelton, Walla Walla. But the place that you were incarcerated was Walla Walla Penitentiary in Washington?

A. Yes.

Q. And what type of facility is that?

A. That is a maximum and medium security penitentiary.

Q. It's a maximum or medium facility, to insure that the people don't get out and do their crimes again. Is that correct?

[p. 228] A. Yes, ma'am.

Q. Were there children in that penitentiary?

A. Just behind it.

Q. Did you have any opportunity to molest any children during your stay at Walla Walla?

A. No, no, ma'am.

Q. And you were at Walla Walla until 1972. Is that correct?

A. Yes, ma'am.

Q. So from about 1967 through 1972, your sexual ability was hampered because you were in the penitentiary, wasn't it?

A. Yes, ma'am.

Q. You didn't have any opportunity to molest children?

A. No, ma'am.

Q. I'm going to show you Petitioner's Exhibit Number Four; and this is the official documents from King County Superior Court in Washington, showing the molestation charges and convictions for the young boy

and young girl, Constance Herzog (sp) and her brother Richard Allen, who was eleven. Do you see those documents?

A. Yes, ma'am.

Q. Now, when they send you out on parole, they have a long talk with you, don't they?

A. Not the State of Washington no, ma'am.

Q. They don't? They just let you out the door?

A. Parole board tells you when you're going home the day you [p. 229] come ready to go home. They turn you loose. Do they give you any instructions?

A. Report to a parole officer.

Q. Do they tell you that you are supposed to have some kind of treatment?

A. No, ma'am.

Q. But you were paroled from the State of Washington back to the State of Kansas. Is that correct?

A. Yes, ma'am.

Q. And on an interstate kind of – they changed your parole from one time to another – So we got you here?

A. Yes, ma'am.

Q. And when we got you here, you went to Sedgwick County Mental Health, didn't you?

A. Yes, ma'am.

Q. And you went to Sedgwick County Mental Health because your parole officer wanted you to have

some care and treatment for your sexual deviancy. Is that correct?

A. Yes, ma'am.

Q. Now, you'd been diagnosed as a pedophile, weren't you?

A. Yes, ma'am.

Q. And you know what a pedophile is?

A. Yes, ma'am.

Q. That's a person who has desires sexually for children?

A. Yes, ma'am.

[p. 230] Q. And you were also diagnosed as having other conditions as being a sexual deviant and a sociopathic personality when you were at Western State Hospital. Is that correct?

A. I'm not sure. I'll take your word for that.

Q. Okay. And you his declare yourself to be a pedophile, don't you?

A. Yes, ma'am.

Q. So you acknowledge the fact that your sexual interest is it directed towards children?

A. Yes, ma'am.

Q. When you came to Sedgwick County Mental Health, your purpose was to work with the sexual offender treatment program to monitor your abnormal behavior. Isn't that correct?

A. That's correct.

Q. And you were seen by doctors there and his group therapist there, were you not?

A. No, ma'am. I was only seen by one person.

Q. And that would be Mr. Waite (sp). Is that correct?

A. I believe that's his name.

Q. And Mr. Waite (sp) is now deceased, I might tell you. But his records are still here. And, as I understand, you would go to these group sessions; and you would sit around in the group sessions; and you would discuss how you felt. Is that correct?

[p. 231] A. No, ma'am. Not with Dr. Waite (sp). It was a one-on-one meeting with Dr. Waite.

Q. And in your discussions with Mr. Waite (sp), you would go on a regular basis, would you not?

A. Yes, ma'am.

Q. And do you recall in January of 1973 discussing with him the strong feelings of dislike you had for your mother?

A. I don't recall any conversations I had with the man, no.

Q. Do you recall telling him that she tried to raise you as a female child?

A. I have. That's – I told that story so many times, it was possible I did, yes.

Q. And you told him that she said you wanted to or needed to wear a bra; that she needed a girl and was determined to make you into one. And you had a lot of resentment for that reason?

A. Yes, ma'am.

Q. At this time you were living with a woman, were you not?

A. Yes, ma'am.

Q. And this woman's name was Elizabeth?

A. Yes, ma'am.

Q. And Elizabeth had been your former wife?

A. Yes, ma'am.

Q. So you and Elizabeth had been married?

A. Yes.

[p. 232] Q. You and Elizabeth had been divorced?

A. Yes, ma'am.

Q. Elizabeth married someone else?

A. Yes, ma'am.

Q. And you came back into her life?

A. Correct.

Q. And Elizabeth had some children, and those were – What are their names?

A. Roger, Ray, Rose and Robert.

Q. And two of them are in the courtroom today, are they not?

A. Yes, ma'am.

Q. And that would be the people sitting or at least one of the two – Rose is sitting here. And Roger has been in the courtroom. Have you seen them in here?

A. Yes, ma'am.

Q. And those are two of your four stepchildren?

A. Yes, ma'am.

Q. But you also had the two natural boys that you did not raise?

A. That's right.

Q. Now, at the time that you moved in in January of 1973, after you had been released from the penitentiary out at Walla Walla, you still had sexual urges towards children, did you not?

A. Not real strong at that point, no.

[p. 233] Q. It was the winter, wasn't it?

A. Yeah, it was.

Q. And your sexual urges changed from season to season?

A. No, ma'am.

Q. You did tell them at Sedgwick County Mental Health that you didn't have any problems with your stepdaughter?

A. No, ma'am. At that point I did not.

Q. And that you told them that when you got the feeling you tried to change your thoughts and to do some

activities that might distract you from wanting to molest children?

A. Yes, ma'am, I did that.

Q. And that you thought that when you were tired or stressed and in the summertime the urges would hit you the strongest?

A. I don't recall that, ma'am; but it's possible.

Q. You continued to have visits; and you continued to talk about your sexual urges, did you not?

A. Yes, ma'am.

Q. And you continued to tell them that you controlled your feelings; but you were concerned about the summer?

A. Yes, ma'am.

Q. And you told them at least in February that you were starting to get uptight because you were concerned about the children being out playing; and summertime was coming. Is that correct?

A. I don't recall that, no.

[p. 234] Q. Were you molesting children during this period of time?

A. I don't believe so, ma'am.

Q. Were you molesting your stepdaughter at this period of time?

A. I don't believe it had started at that point, no.

Q. Were you molesting your stepson, Roger, at this time?

A. I don't believe it started at that point, no, ma'am.

Q. So you believe you were controlling your urges?

A. I thought I was.

Q. You continued to go through Sedgwick County Mental Health and to meet and in March of 1973, you told them that you didn't know how you would do because the summer was coming. Is that correct?

A. Yes, ma'am.

Q. And you knew that there would be a lot of children out in the summer?

A. Yes, ma'am.

Q. And the children would be accessible to you?

A. Yes, ma'am.

Q. And your sexual urges were very strong, and you knew that you had the propensity to molest?

A. Yes, ma'am.

Q. And you knew that you couldn't control it?

A. Yes, ma'am.

Q. And you continued to go, and in April again you talked [p. 235] about your problems with the doctors there at Sedgwick County Mental Health. Is that right?

A. Yes, ma'am.

Q. And you missed an appointment here and there, didn't you?

A. Yes.

Q. And then in April, the end of April, you told them you thought everything was gonna be okay; and you didn't think you had any urges?

A. Yes, ma'am.

Q. And again in May you reported to them you didn't think you would have any – any urges?

A. I run out of money. I couldn't afford them.

Q. I'm sorry?

A. I run out of money. I couldn't afford to go any more.

Q. Sedgwick County Mental Health is on a sliding sale [sic]?

A. Yes, ma'am, but I had to take a taxi. I couldn't afford the taxi any more.

Q. Because you couldn't take a taxi, you couldn't go to any more sexual treatment. It's coming to the summertime in June; and you stopped going, didn't you?

A. Yes, ma'am.

Q. So you had told them earlier that you got the urges in the summertime; and it was now the summertime. And you quit going to therapy, didn't you?

A. Yes, ma'am.

[p. 236] Q. Is that when you started molesting Rose?

A. Somewhere in that period.

Q. So the urge got to you?

A. Yes, ma'am.

Q. She was accessible?

A. Yes, ma'am.

Q. She was a child?

A. Yes, ma'am.

Q. And you molested her?

A. Yes.

Q. She was your own stepdaughter?

A. Correct.

Q. Did you think that was a problem?

A. It's a problem.

Q. Did you think it was then?

A. Yes.

Q. But you sought no treatment?

A. No, ma'am.

Q. And you continued to molest her?

A. Yes, ma'am.

Q. And you tended to hold it over her head and give her permission to do things if she would satisfy your –

A. I don't recall that.

Q. – sexual desires?

A. I don't recall that, no.

[p. 237] Q. And you started to molest your stepson, did you not?

A. Yes.

Q. And your stepson had cerebral palsy, didn't he?

A. Yes, ma'am.

Q. And during this time your daughter or your granddaughter was placed in your home by social and rehabilitative services, wasn't she?

A. Yes, ma'am.

Q. And that was an infant girl?

A. Yes, ma'am.

Q. Did you molest her?

A. No, ma'am, I did not.

Q. Did you have sex with your wife during this time?

A. I believe I did, yes.

Q. Did you have some problem with the sexuality of your wife?

A. Yes, ma'am.

Q. Did you think she was overweight?

A. Yes, ma'am.

Q. Did you think she nagged you too much?

A. Yes, ma'am.

Q. And that turned you off?

A. Yes, ma'am.

Q. To her?

A. Yes, ma'am.

[p. 238] Q. So you molested your daughter?

A. Yes, ma'am.

Q. She wasn't overweight?

A. No, ma'am.

Q. And she didn't nag you?

A. No.

Q. You're still a pedophile at this time, weren't you?

A. Yes, ma'am.

Q. Now, you did get caught during this period, didn't you?

A. Yes, ma'am.

Q. And it was 1978 when they blew the whistle on you and said they thought you were molesting your son?

A. Yes, ma'am.

Q. And social and rehabilitative services broke in and made you go back to Sedgwick County Mental Health, didn't they?

A. Yes, ma'am.

Q. And they wanted you to be seen because they were concerned that you were molesting your stepson?

A. Yes, ma'am.

Q. And you were molesting him?

A. Yes, ma'am.

Q. And you were placing your mouth on his penis?

A. I don't remember that, ma'am.

Q. You were touching his genitals?

A. Yes, ma'am.

[p. 239] Q. Were you causing him to give you oral sex?

A. I tried.

Q. And were you having oral sex with your daughter, Rose?

A. Yes, ma'am.

Q. And were you having intercourse?

A. I don't remember.

Q. Were you ejaculating on her?

A. No.

Q. This all that was happening in the basement of the home where you and the two children were located?

A. Yes, ma'am.

Q. And you did not share a room with your wife, did you?

A. I did up until I went working third shift.

Q. And so then the kids were more accessible to you downstairs, weren't they?

A. Yes, ma'am.

Q. Okay. So you had them right there when you needed them, didn't you?

A. You could say that.

Q. And so you went to Sedgwick County Mental Health, and you complained about your sex life and said you had trouble ejaculating?

A. Yes, ma'am.

Q. But you didn't have any trouble with the children, did you?

[p. 240] A. Yes, ma'am, I did.

Q. Now, after this episode, there was no arrest, was there?

A. No, ma'am.

Q. There was no conviction, was there?

A. No, ma'am.

Q. And Rose never told anyone that you were molesting her, did she?

A. I think she told her mother.

Q. And her mother protected you, didn't she?

A. Yes, ma'am.

Q. And she didn't tell you to stop doing that, did she?

A. She tried to stop me.

Q. Didn't do a very good job, did she?

A. Yes, she did.

Q. So you stopped molesting Rose?

A. For a while there, yes, ma'am.

Q. But did the urge get you again?

A. Yes, ma'am.

Q. Did you have trouble controlling it?

A. Yes, ma'am.

Q. Did you molest her again?

A. I don't remember. It's been many years.

Q. Many children ago.

A. No, many years.

Q. You found a couple more kids in 1984, while you were [p. 241] working at an electronics shop, didn't you?

A. Yes, ma'am.

Q. And there were two young boys that were thirteen years of age that you molested in Wichita back in 1984?

A. I tried to. I did not get it accomplished.

Q. You fondled those boys in their genital area?

A. I tried to fondle them.

Q. Were you looking to get the job done?

A. I tried.

Q. And what stopped it?

A. They did.

Q. So it wasn't that you stopped yourself. They stopped it?

A. Yes.

Q. Had they not stopped it, you would have gone forward?

A. I was interested, yes.

Q. You had the urge for them, did you not?

A. Yes, ma'am.

Q. And at this time you weren't exclusively interested in little girls, were you?

A. No, ma'am.

Q. You were interested in boy or girl?

A. Yes, ma'am.

Q. Did you believe it was okay?

A. No, ma'am, I knew it was wrong.

Q. But you told the authorities you didn't think there was [p. 242] anything wrong with it?

A. When you get arrested, you tell them a lot of things.

Q. You told Detective Davenport that you had been arrested for this a number of times, didn't you?

A. Yes, ma'am.

Q. And you told Detective Davenport that you just couldn't stop the urges?

A. I don't remember what I told that man.

Q. If he says that, would you dispute it?

A. No.

Q. Well, then you left and you got convicted here in Sedgwick County, didn't you?

A. Yes, ma'am.

Q. I know this is a legal document, but you did have to go to court here in Sedgwick County. You had a lawyer, and you ended up being convicted of indecent liberties with a child. Is that correct?

A. That's right.

Q. And Petitioner's Exhibit Number Six is that court file. You probably haven't seen this.

A. I have seen a lot of stuff in Kansas courts, yes, ma'am.

Q. So this is what you were originally charged with back in 1984 and what you got convicted on. And the bottom line is you went to the penitentiary?

A. Yes, ma'am.

[p. 243] Q. But before you went to the penitentiary, they sent you again to the Kansas Department of Corrections to have an evaluation, didn't they?

A. Topeka, yes, ma'am.

Q. Topeka. And that's called the State Reception and Diagnostic Center. It was then, wasn't it?

A. Right.

Q. And during that time, you talked to a number of people, didn't you?

A. I can't remember who I talked to.

Q. More than one person.

A. Yes.

Q. They poke you, prod you, check your heart, liver, lungs they check you all over; and they check your mind, don't they?

A. Right.

Q. And you had talked to these people, and you took some tests?

A. Right.

Q. They make you take these psychiatric or psychological tests. Fill in the blanks. They ask you questions?

A. Yes, ma'am.

Q. And you tried to be as truthful as possible to them?

A. I don't think so. I don't believe anybody is truthful.

Q. Excuse me?

[p. 244] A. I don't think anybody was truthful on those tests.

Q. So you don't think you were truthful on those tests?

A. No.

Q. You're saying you lied to them? You're telling the truth?

A. Yes, ma'am.

Q. You're telling the truth to us here in court?

A. I have to.

Q. They said that you disclosed your sexually abhorrent behavior and told them that it happened when you were very young?

A. I don't remember talking to anyone up there. I remember talking to people, but I don't remember what I said to anybody.

Q. Do you remember telling them you tried to be discrete choosing children you didn't know and where you would not be seen?

A. That sounds like something I could have said.

Q. The truth of the matter was you tried to be discrete. You weren't going to do it in front of their parents. You took them away from their home.

A. No.

Q. And you weren't going to do it in front of witnesses?

A. True.

Q. You were not going to do it an open park, sex with these [p. 245] kids. You were going do it in a car.

A. Right.

Q. You tried to be discrete?

A. Yes.

Q. You also told them that you could act on these impulses once to twice a month. Do you remember telling them that?

A. No, ma'am, I don't remember that.

Q. But if the records reflect that, you won't dispute that?

A. I won't dispute that that's what the record shows.

Q. I want to do some mathematices [sic] here. You said in the SRDC report that once to twice a month that you would engage in these sexual activities. Do you remember? Do you recall my question?

A. I recall – What question is that?

Q. Let me rephrase it for you. You spent since 1956 out of the last thirty-eight years – about half of that or nineteen years in prison or in psychiatric institutions, have you not?

A. Yes, ma'am.

Q. All right. And you told them that when you were out 'cause we know there weren't any children accessible to you the times that you were in the penitentiary. Is that right?

A. That's right.

Q. So you didn't have relationships with children during those approximately nineteen years?

A. That's true.

[p. 246] Q. But you did have nineteen years on the loose, didn't you?

A. Yes, ma'am.

Q. And during that time, you were non-exclusively picking on little boys and little girls and choosing them for your sexual enjoyment?

A. Not all the time, no, ma'am.

Q. Was it for their sexual enjoyment?

A. No, I didn't do it all the time. There was times when nothing would happen.

Q. Times that you couldn't find anybody?

A. No, times when I had no urges to do so.

Q. Not very often?

A. Oh, quite a few times, ma'am.

Q. Did you have the same kind of sexual urges for your wife?

A. No. No, ma'am, but in Seatle [sic] I did have a girlfriend.

Q. She have kids?

A. No.

Q. You gave some reasons to the State Reception and Diagnostic Center for why you did this. You felt that you were stressed out, and that's why you molested kids. Is that right?

A. Yes, ma'am.

Q. So when you do get stressed, then, you feel the urge comes on; and you want to molest a child to relieve the stress?

[p. 247] A. No, ma'am. I can't control the urge when I get stressed out.

Q. And you get stressed out under many different circumstances, don't you?

A. Not a whole lot, no, ma'am.

Q. Are you stressed out today?

A. A little bit.

Q. Have you got the urge today?

A. No.

THE COURT: Mrs. Foulston, I believe this is the opportune time to take a short recess.

MS. FOULSTON: Certainly, Your Honor.

THE COURT: Ladies and gentlemen of the jury, Ms. Soper should be here shortly; and I'm going to have her escort you to your jury room. We will take a recess and try to reconvene in about fifteen minutes.

(Pursuant to the recess, proceedings continue as follows outside the presence of the jury.)

THE COURT: We're now all assembled outside the presence of the jury. Party want to put any matter on the record before we bring the jury back in?

MS. BARNETT: No, Your Honor.

THE COURT: Very well.

MR. WEILERT: No, Your Honor.

[p. 248] THE COURT: Well, I will ask Ms. Soper to bring the jury back in, please.

(The jury returns to the courtroom.)

THE COURT: Good morning ladies and gentlemen. Mrs. Foulston.

MS. FOULSTON: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

Q. For the record, you are the same Leroy Hendricks that testified prior to the break?

A. Yes, ma'am.

Q. And you understand you're under the same oath, sir?

A. Yes, ma'am.

Q. Mr. Hendricks, we had talked a little bit about the fact that you had been paroled to the State of Kansas from the State of Washington; and I'm going to show you State's Exhibit Number Five, petitioners exhibit; and these are some additional documents regarding your order of parole and conditional release. Do you see that?

A. Yes, ma'am.

Q. Does your signature appear on that document?

A. Yes, ma'am.

Q. All right. So that would suppose that you would have gotten a copy of this. Is that correct?

A. Yes, I used to have a copy of that.

Q. So they told you that you had to consult with the parole [p. 249] officers regularly and that you had to participate in an outpatient program concerning sexual problems under the guidance of the parole authority. Is that right?

A. Yes, ma'am.

Q. And as a consequence, that's when you went to Sedgwick County Mental Health here in Kansas?

A. Yes, ma'am.

Q. And your parole wasn't revoked as a result of your not going to the treatment, was it?

A. No, ma'am.

Q. So nothing happened to you because you didn't go?

A. That's right.

Q. And we had also talked about your conviction in 1963 in the City of Seattle, and is this your photograph from that? Can you see that? Let me bring it up closer for you.

A. No, I can't see that now. I've never seen that photo before.

Q. Can you speak up?

A. Yes, ma'am. I assume that's me. I'm not sure. I couldn't identify myself in that picture.

Q. There's a hearing aid. Does that help you?

A. No, ma'am, it does not. It doesn't look like any pictures I've seen of myself, but it could be me.

THE COURT: Mrs. Foulston, I might advise you that that microphone is not hooked up to the – [p. 250] What was the exhibit number on that last photograph?

MS. FOULSTON: Ten. And then Five was before that, Your Honor.

BY MS. FOULSTON:

Q. Directing your attention to State's Exhibit Number Eleven, do you recognize this photograph?

A. Yes, ma'am.

Q And this is the photograph that was taken when you were booked into the Sedgwick County Jail after your arrest for the molestation of two young boys here in Wichita in 1984?

A. I believe so.

Q. Okay. Now, back to the fact that you went to the State Reception and Diagnostic Center up in Topeka they wanted to diagnose you or figure out what exactly your problems were. Is that correct?

A. I believe so.

Q. And they did find that you were a pedophile, didn't they?

A. Yes, ma'am.

Q. And that you engaged in sexual deviant behavior, is that correct?

A. Correct.

Q. And as a recommendation, they ended up sending you to the penitentiary, didn't they?

A. Yes, ma'am.

Q. Now, when you were talking with them, in the [p. 251] psychological evaluations, you told them that it was stress that led you to the offenses that you committed. Is that right?

A. I believe so.

Q. And that you also still in court today believe stress has something to do with the fact that you molested the children?

A. Yes, ma'am.

Q. Do you see this as a sexual relief for you from your stress?

A. I don't know.

Q. Do you have insight into your problem?

A. Some.

Q. And you realize that it is a problem that involves other people, do you not?

A. Yes, ma'am.

Q. And you realize that it visits on children grave harm, do you not?

A. Yes, ma'am.

Q. Now, you realize that now, but you in 1985, when you were evaluated at the Reception and Diagnostic Center, indicated that sometimes the children enjoyed the relationship?

A. Some did, yes, sir – Yes, ma'am.

Q. And you believe that the children liked the sexual activity that you performed on them?

A. One or two have, yes, ma'am.

[p. 252] Q. And do you believe that these children asked for it?

A. No, ma'am, I do not.

Q. All right. Did you believe that some of the children invited your attention?

A. No, ma'am.

Q. And were there some children that you did not engage in intercourse or in sexual behavior with that you approached?

A. Oh, yes.

Q. All right. And some walked or ran away?

A. No, just – I never done anything with them.

Q. Is there any kind of child that appeals to you more than another kind of child?

A. No, ma'am.

Q. So it doesn't matter if they're black or white?

A. No, ma'am.

Q. Blonde or brunette?

A. No, ma'am.

Q. Tall or short?

A. No, ma'am.

Q. Fat or skinny?

A. No, ma'am.

Q. You just like kids?

A. Some, yes.

Q. In your own special way?

A. Yes.

[p. 253] Q. You told them in the Reception and Diagnostic Center when they evaluated you that you weren't really motivated to change your behavior?

A. I don't recall saying that.

Q. Was that your feeling?

A. No, ma'am.

Q. But you did go to the penitentiary, didn't you?

A. Yes, ma'am.

Q. And they did ask you to involve yourself in the sexual offender treatment program that was offered?

A. Yes, ma'am.

Q. And that was free of charge, was it not?

A. Yes, ma'am.

Q. There was no cost to enroll?

A. No, ma'am.

Q. No taxi fair [sic]. You were there?

A. Yes, ma'am.

Q. And they have a program?

A. Yes, ma'am.

Q. And it involves psychologists?

A. I don't know what it involved.

Q. You don't know what it involved, 'cause you didn't go, did you?

A. No, ma'am, I did not.

Q. You didn't go because you didn't feel you needed the [p. 254] treatment, did you?

A. No, ma'am. That was not the reason.

Q. You didn't go because you get paid when you work in the penitentiary. Is that correct?

A. Yes, ma'am, you do.

Q. And you get paid anywhere between 45 cents a day to a dollar five a day. Is that correct?

A. That's right.

Q. And if you took the sexual offender treatment program, you wouldn't get paid as much. Is that right?

A. That's absolutely correct.

Q. So you made a choice?

A. I made a choice.

Q. And your choice was money over treatment?

A. No, ma'am. Joan Hamilton (sp), the parole board lady, made my choice for me.

Q. I can't hear you with your finger over your mouth.

A. I said Joan Hamilton on the parole board made my choice for me.

Q. You chose to earn more money than you did to take treatment. Is that correct?

A. Yes, ma'am.

Q. And so for the ten years you spent within the penal institution, you did not have one day of treatment for your sexual deviancy, did you?

[p. 255] A. Correct.

Q. Did you continue to have thoughts about children during the time you were in the penitentiary?

A. No, ma'am.

Q. So it just went off?

A. You don't think things like that in there. That's dangerous.

A. [sic] You had a normal stay in the penitentiary?

A. I would say normal, yes.

Q. Adjusted well to the penitentiary life?

A. Yes, ma'am.

Q. Presented really no problems?

A. No problems.

Q. No children in the penitentiary?

A. No problems.

Q. No allegations of molesting any children?

A. No.

Q. No interest in adults of the opposite sex?

A. No, ma'am.

Q. Or same sex?

A. No, ma'am.

Q. The only medical problem you had was the hernia surgery in 1988. Is that correct?

A. That and my asthma and bronchitis.

Q. So but in 1988 you did have a some – some abdominal [p. 256] surgery. Is that correct?

A. Yes.

Q. But other than that, no medical care?

a. No.

Q. You're not cured of being a pedophile today, are you?

A. I don't believe so.

MS. FOULSTON: Thank you. I have no further questions.

THE COURT: Cross examination?

MR. WEILERT: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. WEILERT:

Q. Leroy, let's go back to 1984. That was the time when you were charged with the indecent liberties most recent case. Do you remember that?

A. Yes, ma'am. Yes, sir.

Q. And at that time you were looking at a lot of time in prison, were you not, sir?

A. Yes, ma'am. Yes, sir.

Q. I think the maximum penalty that you could have had at that time was forty-five years to a hundred and eighty years?

A. Something like that, yes.

Q. And you made a plea agreement with the State that they would recommend a five-to-twenty-year controlling sentence, wouldn't they?

[p. 257] MS. FOULSTON: Objection as to relevancy, Your Honor.

THE COURT: Sustained.

BY MR. WEILERT:

Q. You went ahead and entered a plea to the two counts, didn't you?

A. Yes.

Q. And you were sentenced to five to twenty years?

A. Yes.

Q. Now, that was back in early 1985, wasn't it?

A. Yes, ma'am.

Q. But you had actually been in custody since, I believe it was September 11th of 1984?

A. Yes.

Q. On September the 11th of 1984, you reached what's called a conditional release date, didn't you?

A. Yes, I did.

Q. And that's the time when you have earned all of the possible good time, you are released on parole?

A. Yes.

Q. Now, you had a condition of your conditional release to go to an outpatient treatment program, didn't you?

A. Yes.

Q. And you were going to be living at a halfway house here in town?

[p. 258] A. Yes.

Q. In any of the sexual activities with children that you have related to us here today, did you use any type of physical force?

A. No, sir.

Q. Did you ever have any kind of weapon?

A. No, sir.

Q. Or make any kind of threat with a weapon?

A. No, sir.

Q. Would it be correct, sir, that you understand that those activities at the – were at your initiation?

A. Yes, sir.

Q. And that you're the one responsible for those activities happening?

A. Yes, ma'am. Yes, sir.

Q. When you said that to you stress is one of the things that makes it difficult for you to control your urges, you understand that that is a problem, don't you?

A. Yes, I do.

Q. And do you have any ideas on how to control your stress besides this acting out with children?

A. Get away from people.

Q. Okay. And have you thought about staying involved with other activities that keep you busy?

A. I have tried that.

[p. 259] Q. During the activities you related, it's correct, is it not, that you were not under the influence of any alcohol or drugs, were you?

A. No, sir, I don't use either one.

Q. Pardon me?

A. I don't use either one.

Q. You didn't engage in any, oh, real bizarre activity, like, you know; bondage or beating or anything like that, did you?

A. No, sir.

Q. You didn't have any particular rituals that you went through as far as finding a victim and then setting and then setting a particular pattern of behavior, did you?

A. No, sir. No.

Q. You said some was at a carnival. Sometimes in a car. The last one was at an electronics store, wasn't it?

A. Yes.

Q. And you were working there?

A. I was.

Q. Now, the difficulties Ms. Foulston indicated that you had with the mother about her treating you like a girl, wanting you to wear a bra, do you think that has anything to do with your activities?

A. It possibly could have, yes.

Q. Do you know for sure?

[p. 260] A. I don't know for sure, no.

Q. If it does, do you feel that's an excuse for your activities?

A. No.

Q. At the time you were last not incarcerated, back in 1984, you were working, weren't you?

A. Yes, I was.

Q. And you were contributing to the support of your wife and your stepchildren?

A. Yes.

Q. And for a while in a way you were – Strike that. You were also engaging in some other activities, I think, in some model building, some other hobbies of that nature?

A. Yes, sir, I was.

Q. Other than the sexual problems with children and your wife, do you feel that the other areas of your adult life were lived – were pretty much in order so far as what society expected of you?

A. Yes, sir, I do.

Q. The Dodge House – That's where you were going to go, wasn't it?

A. Yes, I was.

Q. And that's a halfway house kind of deal, isn't it?

A. Yes.

Q. And it's an environment where you can talk with [p. 261] counselors if you need to?

A. I believe so, yes.

Q. And you can go out and work have a job so that you can pay your own way there?

A. Yes, sir, there is.

Q. And they pretty much make sure that you do the other things you are supposed to do while you're on parole, don't they?

A. Yes, they do.

Q. And if you don't do that, they don't have any hesitancy at all about turning you in, do they?

A. No, they don't.

Q. Do you currently have an urge to have sexual relationships with a child?

A. No, I do not.

Q. When was the last time you feel that you did have such a feeling?

A. Oh, probably in 1984, '85, so –

Q. So during the time of your incarceration, you have not had that?

A. No, I have not.

Q. In all the time between 1956 and 1984, over that, what, twelve-year period, you were either in prison or a hospital for about ten years of that time?

A. I believe that's correct.

[p. 262] Q. Have you got any idea what would happen to you if you got out and engaged in the same type of activity again?

A. I would do the rest of my life in prison.

Q. Do you want to do that?

A. No, I do not.

Q. Why not?

A. I'm sixty years old. I've got very few years left. Bad and good health – Not bad health but not good health either. And I would like to spend some time with my mother before she dies. She's eighty-three, and I sure don't want to hurt anybody.

Q. Do you think you've hurt people in the past with your activities?

A. I believe I have, yes.

Q. Pardon me?

A. I believe so, yes, not physically but mentally.

MR. WEILERT: I don't have any other questions. Thank you, sir.

REDIRECT EXAMINATION

BY MS. FOULSTON:

Q. You haven't physically hurt anyone? Is that what you say?

A. Physically, no.

Q. Mr. Hendricks, directing your attention back to those years when you were living with Elizabeth Hendricks in the [p. 263] company of her four stepchildren, you were building model airplanes during that time, weren't you?

A. I was.

Q. And you were involved with – with the civil air patrol, weren't you?

A. I was.

Q. You were engaging in those hobbies and model building and the things that you talked about that are your stress busters?

A. That's correct.

Q. You were molesting Rose, and you were molesting Roger at the same time, weren't you?

A. I don't know if it was in the same time. There was times I didn't have money to buy models.

Q. You will molest your kids instead to bust the stress if you don't have money to buy model planes. Is that what it is?

A. I believe that's what it is, yes.

Q. You said your parole plan or what you wanted to do was go to the Dodge House. Is that correct?

A. That's right.

Q. And that's here in the City of Wichita?

A. Yes.

Q. And there are 400,000 plus people in the City of Wichita?

A. I don't know what the population is here.

[p. 264] Q. And there's a large population of children in this community, aren't they?

A. Yes.

Q. And you're asking us to believe that you are not going to molest children again, aren't you?

A. I hope I don't.

Q. Are you going to guarantee that you are not?

A. The only way to guarantee that is to die.

Q. And you've never walked in off the street at any time to seek mental health and counseling, have you?

A. No.

Q. On your own?

A. No.

Q. The only time you've ever been in counseling or in an institution is when you got caught. Isn't that right?

A. Yes, ma'am.

Q. In fact, you told Dr. Befort that treatment was bullshit, didn't you?

A. Yes, sir, yes, ma'am, I did.

Q. You wouldn't say you're motivated to change, then, are you?

A. Yes, I am.

Q. Are you planning on dying soon?

A. I don't have many years left.

Q. You have enough years left to molest more children?

[p. 265] A. I don't know.

MS. FOULSTON: Nothing further.

THE COURT: Anything further, Mr. Weilert?

MR. WEILERT: No, Your Honor.

THE COURT: Sir, you may step down.

State may call its next witness at this time.

MS. FOULSTON: State calls Stella Carter.

STELLA CARTER called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Please state your name for the jury.

A. Stella Jean Carter.

Q. And, Miss Carter, do you live here in Wichita?

A. Yes, I do.

Q. I would like to ask you to think back to when you were about eleven years old. Did anything happen to you that scared you or made you feel uneasy?

A. Yes.

Q. What happened?

A. When I was eleven, my friend and I, Sandy, was walking home from school, which is at Sowers (sp), which is over there by Joyland. And it was noon time, and we were walking. And we got about the middle of Joyland parking lot. We seen [p. 266] this car pull up to the Jordan brothers that were in front of us, and the Jordan brothers talked to the occupant in the car. And then they took out really fast on their bikes. We didn't know why. Then we seen the car turn around, and it came back to us. And this young man was in it, and he asked us if we knew where some street was. And Sandy and I looked at each other and we said no; and we kinda wandered over to the passenger side of the car. And he was talking to us and all of a sudden he exposed himself to us. And it really shocked us. I mean, that was the first time I had ever seen a man. And I think that was the first time for Sandy. And we just kinda looked at it each each [sic] other. And he was stroking himself. And he said, "Do you know what this is?" We just kind of looked at each other and shook our heads. He said, "Would you like to get in and play with it?" And we said no. And he took out – Then we ran all the way to my house, which is over on Sunnybroook [sic]. And my mom was cutting the yard. And we couldn't breathe because we ran so fast, and it really scared us. That was a traumatic experience, and we couldn't talk and –

Q. All right. Let me just ask you to back up, if I could, a little bit if I could. Do you know what year this happened in?

A. I was eleven, '55, '55.

Q. Do you recall how old Sandy was at the time?

[p. 267] A. She was the same age I was.

Q. Were there any adults other than this other person that exposed himself to you nearby?

A. No.

Q. Would you have described this person as an adult?

A. Oh, yeah, yeah, he was an adult.

Q. Do you remember anything in particular about the car?

A. It was a bigger car.

MR. WELERT [sic]: Excuse me, Your Honor. If this is to try to prove the identity of Mr. Hendricks, we'll stipulate that that was him.

THE COURT: Will you accept that stipulation?

MS. FOULSTON: Yes, Your Honor. We will accept that stipulation.

MR. WEILERT: Very well.

BY MS. FOULSTON:

Q. Do you know if anyone was ever convicted because of what had happened to you and Sandy?

A. No, I really don't know if there was or not. I know that we went to the police lineup, and we picked the individual out. But I really don't know what happened to him. At that time I didn't know what happened to him.

MS. FOULSTON: All right. Thank you. May I have just a moment please, Your Honor.

We have no other questions at this time, Your Honor.

[p. 268] THE COURT: Any cross?

MR. WELERT [sic]: No questions.

THE COURT: Very well. You may step down, ma'am. State may call its next witness.

May this witness be released?

MR. WEILERT: Yes, she may.

MS. FOULSTON: Yes.

The State calls Rose Loux to the stand.

ROSE LOUX recalled as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Please state your name for the jury.

A. Rose Loux.

Q. And I don't want to embarrass you, ma'am; but how old are you?

A. Thirty-one.

Q. I'd like to direct your attention to the man seated over at the other table, the farthest end, wearing the light blue shirt, short sleeves, wearing glasses. Do you recognize that person?

A. Yes, I do.

Q. Who do you recognize him to be?

A. Leroy Hendricks, my stepfather.

[p. 269] Q. How long has he been your stepfather?

A. Since I was about nine.

Q. Now, I'm going to refer to him as the respondent from now on, just so you know who I'm talking about. Did you ever live in the same residence with the respondent?

A. Yes.

Q. And from what age?

A. From about nine to eighteen.

Q. Do you recall where you lived at early on, nine to ten years old?

A. Yeah.

Q. Where?

A. 3427 All Hollows.

Q. That here in Wichita?

A. Uh-huh.

Q. And when the respondent first came to live with you, was there anyone else in your family or your home?

A. My three brothers and my mother.

Q. What was your brothers' names?

A. Ray, Roger and Robert.

Q. And what was the [sic] your mother's name?

A. Elizabeth.

Q. Does your mother still live?

A. Yes.

Q. And do you have [sic] happen to know if she is still married to [p. 270] the respondent?

A. Yes, she is.

Q. Now, you indicated that you had lived with the respondent from the time you were nine to eighteen, is that correct?

A. Yes.

Q. During that time, did anything ever occur between you and the respondent of a sexual nature?

A. Yes.

Q. When did that begin?

A. It started shortly after he came to – I'd say about six months after he came came [sic] till I was fourteen.

Q. And what type of activity was it that started shortly after he came?

A. The first time I can remember it was the – I guess oral sex. I mean, he did it – to put his – He didn't put his tongue in me or anything; but he wanted to kiss it, 'cause he thought he had improperly punished me with a belt.

Q. And you're indicating that the respondent performed oral sex on you?

A. Yes.

Q. And you say that he thought he had improperly punished you?

A. He thought that the belt had hit me in the wrong spot, yeah.

Q. So what happened?

[p. 271] A. He wanted to make sure that it hadn't; and he took off my underwear; and then he wanted to kiss me.

Q. All right. In your genital region?

A. Yes.

Q. Now, how often – Strike that. Did it ever occur again after that?

A. Yes.

Q. Do you have any idea of how many times or how often it occurred?

A. Lots.

Q. Can you –

A. Probably three, four times a month. I'm not sure. Sometimes was more than others. And one period of time it did stop, and then it started again.

Q. Would it be exclusively oral sex on you?

A. Yeah.

Q. Okay. Did you ever have to do anything to the respondent?

A. No.

Q. Himself. Would he ever touch you in any other area other than your genital region?

A. No.

Q. Where would this activity take place at?

A. In the basement of our house or in the car. I don't remember any other places.

[p. 272] Q. And how old where [sic] you when this stopped?

A. I was fourteen.

Q. Now, you indicated there was a period during which it stopped?

A. Uh-huh.

Q. Do you recall what age you were at that point?

A. I was around twelve, eleven or twelve.

Q. And for what length of time did this activity stop?

A. I can't say for exactly how long. Maybe a year if that much.

Q. Do you know why it stopped?

A. No.

Q. Did you ever tell anybody while this was taking place about what was happening?

A. I told my mother one time.

Q. What was her reaction?

A. She made me sit on his lap while he apologized to me.

Q. Did she take any other precautions that you know of to try to prevent this from happening?

A. She moved my room upstairs next to hers.

Q. Where had your room been?

A. In the basement beside Leroy's.

Q. The respondent's bedroom was downstairs?

A. Did the respondent and your mother share a bedroom?

A. At first for a little while but most of the time, no.

[p. 273] Q. And when you say the time that they didn't share a bedroom, where was his bedroom located at then?

A. Downstairs, beside mine.

Q. Was your mother's bedroom ever downstairs?

A. No, it was always upstairs.

Q. Now, the downstairs area we're talking about, was that like on a first level; or where was that at?

A. It's a bi-level house, so it's like half underground.

Q. Did your mother ever go down to this lower area?

A. Hardly ever.

Q. Now, when the sexual activity wih [sic] the respondent finally ended for good, I believe you said you were fourteen. Is that correct?

A. Uh-huh.

Q. Do you know what made it stop then?

A. I did.

Q. How would you make it stop?

A. I told him if he ever touched me again I would kill him.

Q. And did he ever try to approach you again after that?

Q. You indicated that you lived in the same home then until you were eighteen. Is that correct?

A. Yes.

Q. Now, you mentioned that you have a brother named Roger. Is that correct?

A. Uh-huh.

[p. 274] Q. And how much younger is Roger than you?

A. He's about seven years younger.

Q. Okay. And did you ever see anything happen with Roger?

A. I never seen anything, no.

Q. Was there ever any time that you felt suspicious or –

A. Yes.

Q. – kind of questioned things? And what was it made – made you feel suspicious?

A. Some of the same things. You catch them alone and things would just be kinda stiff and tense; and he was doing things like taking Roger for rides with him a lot, like he used to do me.

Q. Now, you mentioned rides. Did your family have a car?

A. Yes.

Q. And did they have a car the entire time you lived at home?

A. I can't be 100 percent sure; but most of the time, I remember having a car.

Q. All right.

A. I think there was a little while that he took the bus places.

MR. WEILERT: No questions.

MS. BARNETT: Your Honor, at this time I would – And I beg the Court's pardon. I would ask to recall Rose Loux again.

[p. 275] THE COURT: All right. You may recall her if the respondent has no objection. Is that correct?

ROSE LOUX recalled as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. I'm very sorry, ma'am. You are the same Rose Loux that just testified?

A. Yes.

Q. You understand that you're still under an oath to tell the truth?

A. Yes.

Q. Let me just ask you when the sexual activity took place between you and the respondent, were there ever any threats made to you?

A. The only time there was was after when I was twelve. It wasn't a physical threat. He didn't have a weapon or anything. I had had my first sexual experience with a boy; and he would threaten me with my mom; and the fear of her was worse than what he would do.

Q. All right. Take a deep breath. Would you like some water?

A. No, I'm fine.

Q. Now, you say he would threaten you with your mom. What [p. 276] do you mean by that?

A. He found out that I had had sex with this boy and he would tell her.

Q. He threatened to tell her if you didn't do what he wanted?

A. Yes.

Q. Did he ever make any other types of threats to you?

A. No.

Q. Were you there promised or given anything for sex?

A. I was. I could learn to drive a car if I could do what he wanted or let him do what he wanted. He would buy me things. I would get to do things liking [sic] skating. He would get it around my mom, get permission to do things.

Q. Was your mom pretty strict at that time in your life?

A. Yes.

Q. Now, let me ask you if you can recall any activities that the respondent was involved in as far as activities involving children. And I don't mean sexual activity. I mean other more normal activities.

A. Just his airplanes and civil air patrol. And there was also just groups of children around him with his airplanes. And the civil air patrol was children.

Q. What kind of airplanes were these?

A. Oh, everything from little gliders to big thousand dollars [sic] jobs. They were big.

[p. 277] Q. These were the type airplanes you would go out in a field, and you would fly – fly and stuff?

A. Uh-huh.

Q. And was it common to see children around the respondent, in your opinion?

A. Yes.

MS. BARNETT: All right. Thank you very much, ma'am. I have no further questions at this time.

THE COURT: Mr. Weilert.

MR. WEILERT: Excuse me, ma'am. Very briefly.

CROSS EXAMINATION

BY MR. WEILERT:

Q. You aren't meaning to imply that there was any kind of sexual activity going on between Leroy and these other children, are you?

A. I can't say that there was. I seen lots of suspicious situations after I was older. I didn't realize that anybody was being hurt besides me.

Q. Okay. But you didn't see anything, did you?

A. No, sir.

Q. And whether you think something is suspicious or not, that's pretty much your opinion, isn't it?

A. Right.

MR. WEILERT: Thank you.

THE COURT: Anything further by the State?

[p. 278] MS. BARNETT: No, Your Honor.

THE COURT: All right, ma'am. You may be excused.

State may call its next witness.

MS. BARNETT: The State calls Roger Morris to the stand.

ROGER MORRIS called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. Would you please state your name for the jury.

A. Roger Morris.

Q. And, Mr. Morris, how old are you?

A. Twenty-four.

Q. Did you just see Rose Loux testify?

A. Yes.

Q. And do you know her?

A. That's my sister.

Q. Now, I want to direct your attention to the man seated over at the other table farthest away, wearing the light blue short-sleeve shirt. Do you recognize him?

A. Yes.

Q. Who is that?

A. Leroy Hendricks.

[p. 279] Q. And are you related to Mr. Hendricks?

A. Yes.

Q. How are you related to him?

A. Stepson.

Q. And how old were you, if you recall, when Leroy Hendricks became your stepfather?

A. Three.

Q. All right. And do you have any other brothers or sisters other than Rose?

A. His two.

Q. Who are they?

A. Two brothers.

Q. What are their names?

A. Robert, Ray Morris.

Q. Are they older or younger than you?

A. Older.

Q. How old are you when you have your first memories of the respondent, Leroy Hendricks?

A. When he started sexually [sic] activities?

Q. About how old were you when that happened?

A. About nine, ten.

Q. Okay. And what's your first memory of that type of experience with the respondent?

A. I don't remember any first memories of it.

Q. Okay. Do you remember any sexual activity with the [p. 280] respondent?

A. Not until I – probably about twelve years old.

Q. All right. Thinking about what happened when you were twelve years old, what do you remember about it?

A. Going downstairs into his room or in the utility room, where he worked on his airplane model.

Q. And what happened down in the respondent's room?

A. He would play with me or have – Or he would suck on my penis.

Q. I'm not trying to embarrass you; but when you say he would play with you, where would he touch you at?

A. On my penis.

Q. Do you recall how many times this happened or how often it would happen?

A. Probably at least once a week.

Q. Did it ever stop for good?

A. No.

Q. And how old were you when the last sexual experience with the respondent occurred?

A. Fourteen.

Q. All right. And during the time, like, let's say from what you remember when you were twelve to fourteen, were there any other places where this sexual activity would occur with the respondent other than down in his room or the utility room?

[p. 281] A. In the car.

Q. Now, you've outlined for us some fondling that occurred or some oral sex on you that occurred. Was there ever any any [sic] other type of sexual activity that the respondent would perform on you?

A. No.

Q. Did he, the respondent, ever ask you to perform any sexual acts on him?

A. Yes.

Q. What would he ask you to do?

A. Suck on his penis. Play with him.

Q. Did you ever do what he made you do by sucking on his penis or playing with him?

A. Yes.

Q. And where would that type of activity take place at?

A. In his bedroom or upstairs or in the car.

Q. Now, during the time that you can recall sexual activity taking place, did the respondent ever threaten you?

A. No.

Q. Did he ever make any promises to you or give you anything of benefit for this sexual activity?

A. Yes.

Q. What?

A. Like to buy – like buy me Skoal when I was in seventh grade. Buy me airplane models.

[p. 282] Q. So the respondent would buy you Skoal when you were fourteen years old? Is that what you are saying?

A. Right.

Q. Did that happen more than once?

A. More than once. About three or four times.

Q. Did your mom know about that?

A. No.

Q. Do you recall if there was ever any type of investigation into allegations that the respondent was engaging in sexual activity with you?

A. Excuse me?

Q. I'm sorry. I didn't phrase that very well. Did anybody ever come out and investigate whether or not Leroy was having sex with you?

A. Not that I can remember.

Q. All right. Have you since in talking to Rose learned that there was an investigation?

A. From what they say there was.

Q. All right. Were you ever removed from the home by SRS or the police department?

A. No.

Q. Do you recall a baby ever being placed in your home or coming to live with you?

A. Yes.

Q. And how where [sic] you related to this baby, if you were?

[p. 283] A. She was my half brother's daughter.

Q. What's your half-brother's name?

A. Jim Robbins.

Q. Do you recall how old she was when she came to live with your family?

A. About two.

Q. And was the respondent living in the home? I'm sorry. Was Leroy Hendricks living in your home when she came to live with you?

A. Yes.

Q. How long did she live with you?

A. Clear up to – I was, I think, six. I'm not really sure.

Q. Till she was six or till you were six?

A. She was six.

Q. How much older are you than she is, if you know?

A. About six or seven.

Q. You're six or seven years older than she is?

A. (Nods, indicating affirmative response)

MS. BARNETT: All right. Thank you very much, Mr. Morris. I have no further he [sic] questions at this time.

THE COURT: Any cross?

CROSS EXAMINATION

BY MR. WEILERT:

Q. Mr. Morris, you said that you talked with your sister, [p. 284] Rose, about this investigation that the SRS did? Do you remember that?

A. There was an investigation on it, but I don't really remember a whole lot of it.

Q. But you did talk to your sister about it, didn't you?

A. Yes.

Q. Did your sister tell you that during that investigation she said there wasn't anything going on between she and Leroy?

A. I don't remember.

MR. WEILERT: Okay. That's all. Thank you.

THE COURT: Any further direct?

MS. BARNETT: No, Your Honor.

THE COURT: All right. May this witness be excused?

MS. BARNETT: Yes, Your Honor.

MR. WEILERT: Yes, Your Honor.

THE COURT: All right, sir. You may step down. You're excused.

At this time, ladies and gentlemen, we're going to adjourn for the noon hour. I would like to have you return and be back here by 1:30. And I'm sure you've worked out with Bonnie. With that I will go ahead and ask you to remember your admonitions and ask you – ask Mrs. Soper to escort the jury out of the courtroom so they can eat lunch.

* * *

[p. 287] has started a jury trial, so your facilities have been limited somewhat. Hopefully we can try to accommodate you by taking a little longer recess next time. Told you you would enjoy it back there, though.

At this time I'll call upon the State. Does the State desire to call another witness?

MS. FOULSTON: State will call Ron Davenport.

RON DAVENPORT

called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Would you please tell us your name.

A. Ron Davenport.

Q. And your occupation, sir?

A. Administrative investigator for the district attorney's office.

Q. Mr. Davenport, how long have you been in that?

A. Five years.

Q. Were you employed in law enforcement prior to that?

A. Yes, I was.

Q. By whom were you employed?

A. City of Wichita.

Q. What was your occupation?

A. A police detective, patrolman and master police officer.

[p. 288] Q. How long were you with the Wichita Police Department?

A. Twenty-two-and-a-half years.

Q. And then did there come a time when you retired from that occupation and changed to the district attorney's office.

A. Yes.

Q. Mr. Davenport, directing your attention back to 1984, were you employed as a detective with the Wichita Police Department during that year?

A. Yes.

Q. Were you assigned to any specific division within the Wichita Police Department detective section?

A. The special investigation section.

Q. And within the special investigation section, were you called upon from time to time to look into crimes alleged to be sexually motivated?

A. Yes.

Q. Did you come in contact with an individual by the name of Leroy Hendricks?

A. Yes.

Q. Do you see him in the courtroom today?

A. Yes.

Q. Would you please identify him for the record.

A. He's setting at the table, taking a drink.

MR. WEILERT: The record should reflect the [p. 289] witness has identified Mr. Leroy Hendricks.

BY MR. WEILERT:

Q. Can you tell the Court and the jury the circumstances surrounding your contact with Leroy Hendricks in 1984?

A. We had two reports made by parents of two young men being sexually molested by an individual at 31st and Seneca in Wichita.

Q. What type of a location was that where these allegations or this activity was alleged to have occurred?

A. It was a business called Gene's Electronics (sp).

Q. And the ages of the young boys that were alleged to have been sexually molested?

A. Thirteen.

Q. Did you in inclusion with your investigative duties learn about the facts surrounding these accusations that had been made? What were you told?

A. That the boys went into this business and were touched on the penis by an individual inside the store who they thought was an employee.

Q. Did you later develop a suspect in that case?

A. Yes.

Q. And was that suspect Mr. Hendricks?

A. Yes, it was.

Q. Did you have an opportunity, then, to meet with Mr. Hendricks in connection with your investigation?

[p. 290] A. Yes.

Q. Did he also meet with other members of the Wichita Police Department in connection with this investigation?

A. Yes.

Q. And would one of those people have been detective Tom Allen (sp)?

A. Yes.

Q. Can you tell us when it was that you visited with Mr. Hendricks in relation to other officers visiting with him as well?

A. The first time I visited with him was the last of July, the 30th of July, and the next time was on the 16th of August.

Q. Of that same year?

A. Yes.

Q. So there were some other activities within the investigation that went on before your second meeting?

A. Yes.

Q. At the time of your meetings with Mr. Hendricks, did you advise him of his constitutional rights under Miranda?

A. Yes, I did.

Q. And did you tell him that he did not have to talk to you if he didn't want to?

A. The form was read out loud by him to me the first time, and the second time he read it to himself. He understood it.

[p. 291] Q. Did he agree to visit with you and talk to you?

A. Yes.

Q. And directing your attention to your latter conversation with him that you had – And the date on that was?

A. August 16th.

Q. And on that date, can you tell us what Mr. Hendricks told you about the activities that had occurred and about his personal history?

A. That he had been convicted in Washington in the sixties; that he had served twenty years and that he had – was off parole; but if he was convicted again that Washington was going to send him back.

Q. Did he discuss with you the fact – Or did he admit to you that he had in fact molested these two

young boys, age thirteen, in Wichita as alleged in the reports the police department had received?

A. Yes, he said he had touched both of their penises.

Q. Did you have any discussion with Mr. Hendricks with regard to the reasons why he did this?

A. He said that it just built up that day. The boys had been in twice. But the day I was interviewing him he said everything was under control.

Q. Did he indicate to you that he had any control over the situation of these urges to molest?

A. Just that he had it under control that day.

[p. 292] Q. All right. And referring to your hand-written notes of that date –

A. Okay.

Q. And you did take some notes on the occasion of your meeting, did you not?

A. Yes.

Q. And on that date, did your notes reveal that this urge, quote, "this built up"?

A. Yes.?

Q. And your notes reveal what following message?

A. Said, "could not stop it that day."

Q. Was he relating to his sexual urge to molest these children?

A. Yes.

Q. And he indicated, though, however, that on the day he visited with you everything was under control?

A. Yes.

MS. FOULSTON: I have nothing further.

MR. WEILERT: No questions.

THE COURT: May this witness be excused?

MS. FOULSTON: By the State.

MR. WEILERT: Yes.

THE COURT: State may call its next witness.

LESTER LEE

DIRECT EXAMINATION

* * *

[p. 314] MS. FOULSTON: I'm not going to inquire those questions that you said he could. I'll end my examination.

THE COURT: I think it would be a benefit for the jury. The term "pedophile" has been used. Somewhat disclosed definition of it I think it might be beneficial to the jury if you would have Mr. Lee go ahead and testify as to what the definition of pedophile is.

MS. FOULSTON: Do you mind if he uses DSM-IV?

THE COURT: I don't mind.

(At this point proceedings continue in the courtroom, in the presence of the jury.)

THE COURT: All right. We're all assembled. Actually we were waiting out there until Mrs. Hamilton could change her paper. That's part of the delay. We were all ready to start again.

Mrs. Foulston, would you please continue your examination.

MS. FOULSTON: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MS. FOULSTON:

Q. Mr. Lee, when we last left off before the conference with the Court, we were discussing the nature of pedophilia.

A. Yes.

Q. And are you familiar with the characteristics of an [p. 315] individual who might be considered a pedophile?

A. Yes.

Q. Are you familiar with the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, also called DSM-IV?

A. Yes.

Q. And is this a publication from the American Psychiatric Association?

A. Yes.

Q. And what is this book?

A. That's our diagnostic manual. Every diagnosis that we have is in the manual.

Q. All right. I'm going to turn your attention to Page 528 of the manual under sexual and gender identity disorder and point you specifically to the diagnostic criteria for 302.2 pedophilia and ask if you can look at that block and refresh your recollection.

A. Yes.

Q. We've been using the term "pedophilia" in court, and I would like if you could to go over the characteristics and diagnosis of one who might be considered a pedophile.

A. Okay. Criteria one over a period of six months recurrent, intense sexually-arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children, generally age thirteen years or younger. Second, the fantasies, sexual urges or behavior caused – [p. 316] caused clinical significant distress or impairment in social, occupational or other important areas of functioning. Three, the person is at least sixteen years of age and at least five years older than the child or children in the first criteria.

Q. And those are the general criteria or characteristics for diagnosis of that sexually aborrhent behavior as put forth by the American Psychiatric Association?

A. Yes.

Q. Is that a recognized treatise of that association?

A. Yes.

Q. And in your field, is this one that is recognized as a manual that you would refer to as being an educational or learned treatise?

A. Yes.

MS. FOULSTON: Thank you. I have no further questions.

THE COURT: Cross examination.

MR. WEILERT: I have no questions. Thank you.

THE COURT: All right, sir. You may step down.

May this witness be excused?

MS. FOULSTON: By the State.

THE COURT: Sir, you are excused. Thank you very much.

MARY E. CHAMBERS

* * *

[p. 326] Befort to the stand.

DR. CHARLES BEFORT

called as a witness, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BARNETT:

Q. Please state your name for the jury.

A. Charles Befort, B-E-F-O-R-T.

Q. What is your occupation?

A. I'm a psychologist.

Q. Do you work at any particular location or place?

A. Yes, I work – My full-time job is at Larned State Hospital, and I work one day a week at a community mental health center.

Q. What type of education have you received or obtained in order to be psychologist?

A. I have a Doctorate degree from Oklahoma State University 1967 in psychology.

Q. And have you – Or let me ask you, when did you receive that?

A. In 1967.

Q. I'm sorry? I didn't catch that. Since that time, have you received any other education seminars or training in the area of psychology?

A. Not formal education in terms of classes except for [p. 327] maybe in computers and total quality management, things like that, from a junior college; but I've been licensed since 1971; and we're required to give evidence of continuing education participation every time we renew. And so there have been many, many many hours of workshops, seminars, things of that sort.

Q. Who are you licensed by?

A. The Behavioral Sciences Regulatory Board of Kansas.

Q. Is that the board that governs or regulates psychologists in the state?

A. Yes.

Q. Since the time that you received your Doctorate, and also since you've been licensed, what has your practical experience been as a psychologist?

A. My full-time job has been continuously at Larned State Hospital, both as a staff psychologist and as the head of the psychology department or chief psychologist. I have also worked at the community mental health center I referred to, which is in Greensburg one day a week for approximately twenty-one years.

Q. What do you do there?

A. At the mental health center?

Q. Yes.

A. Primarily, I do psychotherapy and counseling. However, I also do evaluations and consult – And I've done [p. 328] supervision of other psychologists there.

Q. Now, you say that you have performed or given therapy, things of that nature. Have you ever worked with sex offenders at this mental health facility?

A. Yes.

Q. And could you estimate for us how many sex offenders?

A. Oh, for twenty-one years; I'm not sure. In recent years, three cases come to mind, two evaluation cases, and another case where I was asked to try to do intervention. They were trying to establish a diversion program for a particular individual.

Q. Now, in talking about your job at Larned, you said you're a staff psychologist. What did you do there as a staff psychologist?

A. Staff psychologist means that your work is primarily clinical; that is, you are working directly with patients in terms of treatment evaluations, treatment planning, treatment implementation, and working with a clinical team in terms of discharging and placing, that type of thing.

Q. And then you indicated you were also a director there. Would that be like an administrative-type position?

A. Yes. I was the chief psychologist in the mid-seventies for a couple of years, and I am currently the chief psychologist and have been so since 1985.

Q. Does that mean that you oversee other psychologists or [p. 329] other psychological professionals at Larned State Hospital?

A. Yes, I'm in charge of the psychologists in the psychology department.

Q. And at Larned State Hospital, have you had the opportunity to work with sex offenders, either people who are accused of committing sex offenses or people who have actually been accused of committing sex offenses?

A. Yes, I have.

Q. On how many occasions?

A. Larned State Hospital has two campuses administered jointly, one superintendent and one chief psychologist and so forth. But the State Security Hospital is for

mostly men, some women, who have been sent to us because they are in some – some kind of criminal trouble. And we are asked to – ordered, not asked, to evaluate them and in many cases to provide treatment. So a lot of persons there – I've been working with what we refer to as forensic cases – that's criminal cases – since probably the early seventies.

Q. Now, with regard to the evaluations that you have mentioned, what do you specifically mean by that when you evaluate someone?

A. If I can go to the forensic cases first, it means that we are requested by the Court to make a specific evaluation. Example –

MR. WEILERT: Excuse me, Dr. Befort. I don't [p. 330] believe the answer is responsive, Your Honor. Ms. Barnett's question was how many evaluations of sex offenders; and now we're into forensic evaluations, which would include all of the other types of offenses also. And I don't think that's relevant in this regard.

MS. BARNETT: Well, as I recall the question just posed to the witness had to do with what is – by the word "evaluations", what does that mean to this particular individual.

THE COURT: All right. Well, you may go ahead and continue. Please make sure you clear it up.

BY MS. BARNETT:

Q. And let me just state, Dr. Befort, do you perform or have you ever performed evaluations on sex offenders, people who are accused or committed sex crimes?

A. Yes.

Q. With regard to – Let's just stick with those evaluations, how do you evaluate a sex offender?

A. It may not – not start out that way. A person may be sent for a competency evaluation to see if they're able to stand trial. And in the course of the evaluation, we try to do a fairly comprehensive, psychology-psychiatric assessment, and so we do the testing; we do the interviewing. We review the records that we have available. We look at the social history information that we have and put together what we [p. 331] hope is a clinical description of the individual, with all this funneling down to the final question, "Is this man in this case – example – competent to stand trial?" We give diagnoses. We describe any kinds of conditions or situations that might mitigate against or for competent functioning in court and so on. But we are clinicians, and we use our clinical skills and competence because they are sent to a psychiatric facility.

Q. Now, you've indicated that in these evaluations, you may make a diagnosis. Is that correct?

A. That's right, sir.

Q. And would that mean a diagnosis with regard to someone's psychological status or condition?

A. Yes.

Q. How do you make a diagnosis of someone, Doctor?

A. Before – Reference was made to the Diagnostic and Statistical Manual IV. That is our diagnostic Bible, I

guess, at the hospital. We're still using the previous version of that book. It's almost as big and is built the same way. But we essentially take a look at the data that we've collected about the person, especially behavioral data, actions, behaviors, things they've done in the past or have said and so forth and how they behaved, whether normally or abnormally. The manual is set up in such a way that you can actually look at behavioral criteria. He does this or [p. 332] doesn't do this, does this, does this and so forth; and it gives you some guidelines as to how many of these behaviors have to appear before you can legitimately make the diagnosis using that manual. And that's essentially how we come up with the diagnosis or in some cases several diagnoses at once.

Q. Would it be fair to say that for twenty-plus years you've been making diagnoses of individuals?

A. Yes.

MS. BARNETT: Your Honor, at this time the State would offer Dr. Befort as an expert in the area of psychology for the rest of his testimony.

THE COURT: Mr. Weilert?

MR. WEILERT: Your Honor, in the area of general psychology, that may be appropriate. I don't think there's a proper foundation for having Dr. Befort declared an expert in the area of the evaluation of sex offenders.

THE COURT: Well, the best of my information there's no necessity for a sub-field of that particular area that I know of. I'll admit the doctor as an expert.

MS. BARNETT: Thank you, Your Honor.

BY MS. BARNETT:

Q. Let's speak just more about sex offenders. Would you have any estimate of how many sex offenders you have made diagnosis on or evaluated for a diagnosis?

[p. 333] A. I never thought of the actual numbers. I'm sure dozens, probably hundreds.

Q. Would it be fair to say that you have been doing that or engaging in that type of activity since you received your license to practice in the area of psychology or your Doctorate?

A. Yes. More in the last twenty years than the first few years but that's true.

Q. Have you found, in fact, that your contact with sex offenders in evaluating them and diagnosing them has increased in the last several years?

A. I would say the last month, which is true, which is very true. A lot of our patients – We've always had a lot of folks who have been sex offenders in our population on the State Security Hospital. Whether it's increased or not, I don't know. There are many.

Q. So would it be fair to say that as a psychologist at the state hospital you've had regular contact with people who are sex offenders?

A. At State Security Hospital, yes.

Q. All right. Thank you, Doctor. Now, we talked a little bit before with Mr. Lee about pedophilia or what a pedophile is. Are you familiar with that term?

A. Yes.

Q. And what does that term mean to you?

[p. 334] A. Using – Not referring to the DSM-III-R, which makes it easier, it's a person who has demonstrated, usually by behavior, which is the most compelling diagnostic criterion, that he has engaged in sexual behavior that is not acceptable to society at large; and is often illegal. The pedophile is a person whose sexual partners, if you want to call them that, are pre-aged folks; in other words, children generally below the age of thirteen. Can be a little higher, depending upon the maturity and so forth. But, anyway, involving these children in sexual behavior with them of some sort.

Q. Have you ever had the opportunity to diagnose or evaluate someone who you believed to suffer from pedophilia?

A. Yes.

Q. Now, when we're talking about this case in pedophilia, are you familiar with the terms of "personality disorder"?

A. Yes.

Q. Does that term in and of itself have a meaning to you?

A. Professionally it does, yes.

Q. What would that meaning be?

A. Again paraphrasing the manual, a person with a personality disorder is an individual who has a set of characteristics or traits that are enduring; that is, traits or characteristics that tend to result in their behaving in

fairly standard predictable ways through most situations. Now, we all have those things, those traits and [p. 335] characteristics. It becomes a disorder when those traits and characteristics result in the person behaving or thinking, perhaps, or otherwise acting in such a way that it causes them trouble, causes society trouble, is considered abnormal, then it becomes a disorder.

Q. Within your profession or within the psychological arena, what type of thing would constitute a personality disorder?

A. An example, you mean?

Q. Yes. An example that we all might be familiar with.

A. I think most of us would be familiar with antisocial personality.

Q. What would that mean?

A. Generally speaking, we're talking about individuals who have disregard for social expectations, social values, social norms. Their behavior indicates that disrespect or unconcern about staying within acceptable boundaries of behavior. Usually these behaviors include disregard for others' rights. They may exploit other people to those persons' detriment. In the worst cases, of course, they turn to crime, criminal behavior. In noncriminal things, they tend to be untrustworthy. They're egocentric, those types of things.

Q. Within the psychological community, is there a term of art, so to speak, for the phrase "mental abnormality"?

A. I'm sorry? What?

[p. 336] Q. Is there a term or phrase "mental abnormality" that has special meaning to you as a psychologist?

A. Certainly clinicians use that phrase. It's not a diagnosis. It's a kind of a general phrase we use to discuss abnormality or deviance.

Q. With regard to pedophilia, that condition, is it considered within your field a personality disorder?

A. Not necessarily. In fact, in terms of the DSM-III, not. There may be a personality disorder also that includes that, but pedophilia as itself is not considered a personality disorder.

Q. All right. Let me ask you. Does the phrase "congenital or acquired condition" mean anything to you?

A. Yes.

Q. What does that mean to you?

A. "Congenital" to me means that it is based in genetics, hereditary backgrounds, biological types of things.

Q. What about "acquired condition?" What would that mean?

A. "Acquired means that it was picked up along the way, during life's experiences. That could be due to the way one is taught, what one learns, how one is conditioned, what experiences occur to the individual in the course of development.

Q. In your opinion, based on your training and your experience, is pedophilia a congenital or an acquired [p. 337] condition?

A. I don't know. I don't know if anybody knows which it is or both.

Q. Is it possible that it's one or the other?

A. It's possible.

Q. Is it possible that it's both?

A. Yes, in my opinion.

Q. Would pedophilia have to be either congenital – a congenital condition or an acquired condition?

A. I can't think of a third option, so I would say it would have to be one or both.

Q. All right. If I were to ask you, does having the condition of pedophilia effect [sic] the emotional or volitional capacity of an individual, would you have an opinion on that?

A. That, of course, refers to the wording in the law; and I had to interpret that.

Q. What do you interpret that to mean?

A. It means because of the condition, acquired or congenital, the individual feels, emotes in certain ways or behaves in certain ways. So if you have a diagnosis resulting from an acquired or conditional condition, that's only worth something if it tells you what kind of an effect it has. So in this case, to me it means that the condition does effect [sic] the emotional and behavioral – behaviors of the individual.

[p. 338] Q. A person who is diagnosed as having the condition of pedophilia, in your opinion, are they predisposed to commit sexual acts with children?

A. Yes.

Q. Let me ask you if you are familiar with the man seated over at the other table, wearing a short-sleeve shirt that's light blue in color?

A. Yes.

Q. Who do you know that person to be?

A. It's Mr. Leroy Hendricks.

Q. And did you have contact with Mr. Hendricks last week in regard to this case?

A. Yes.

Q. And the contact that you had with him, what type of contact was it?

A. Mr. Hendricks had been sent to Larned State Hospital for an evaluation.

Q. Did you perform that evaluation?

A. And I performed that evaluation.

Q. How did you perform that evaluation?

A. I interviewed Mr. Hendricks on three occasions, one at some length and the other two briefer. I also referred to historical records that were made available to me, and we also did a little bit of testing.

Q. What type of testing did you do?

[p. 339] A. I'm not familiar with any tests about pedophilias, but these are standard personality inventories. One is called the Minnesota Multiphasic Personality Inventory. The other is the Milan (sp) Multi-Axial Clinical Inventory Number Two.

Q. Now, you indicated that you interviewed Mr. Hendricks. Is that correct?

A. Yes.

Q. When you interviewed Mr. Hendricks, did you talk of his background, including his convictions?

A. I have to refer to my notes because I did see several of these at once – not at once.

Q. You did take notes?

A. These led to my report; and I need to refer to that, if I may.

Q. Please refer to them if that will refresh your recollection. Let me ask you, did you make that report near in time to when you actually interviewed Mr. Hendricks?

A. Yes, this report was completed within two or three days after I interviewed him.

Q. And have you tried to make it as reliable and as complete as possible?

A. Yes, I hope I always do that.

Q. And then with regard to the court – to using it today, will it aid you in refreshing your recollection about things?

A. It's not just recollection. It's making sure I don't [p. 340] attribute something to him that may have been another fellow's. So I want to make sure.

Q. When you spoke to Mr. Hendricks, did you talk to him about his prior incarceration here in Kansas?

A. Yes, I did.

Q. And did you have the opportunity to ask him about whether or not he had participated in any sex offender treatment programs in prison?

A. I knew from reviewing historical data, it was reported he had refused or had chosen not to participate in the sex offender treatment program that was offered. And so I asked him that specifically, in other words, that I understood he had refused; and I asked him why.

Q. Did Mr. Hendricks give you an answer to that?

A. Yes, he did.

Q. What did he say?

A. He said that he went before the parole board in the usual time and was told there by a parole board member, quote, "There is no cure for your type", unquote. He said that because of that statement, he felt that he would never be granted parole, and therefore participating in a program of that sort was a waste of his time. Additionally, I don't know how it's set out, but he said to participate in that program would have reduced the amount of money he would earn daily from a dollar and five cents a day to 45 cents a day.

[p. 341] Q. When you were talking to Mr. Hendricks on these occasions, did you have a chance to talk to him

about his sexuality, for example, his classification as maybe being bi-sexual or a pedophile?

A. Yes. Again historical records attributed that statement to him; that is, that he described himself as a bi-sexual or pedophile. He said he didn't think he ever was a bi-sexual. And with regard to being a pedophile, he said his – "Well, I understand if a person has sex with a child, he's a pedophile." So under that, yes.

Q. During your conversations with Mr. Hendricks on these occasions, did you talk to him about the specifics of his convictions, such as the type sexual activity he engaged in with the children?

A. Yes, I did.

Q. And specifically right now I want to refer you to the 1984 conviction. Did you ask him about that type of conviction or that type of sexual activity?

A. Yes, I began with that later – latest conviction. He said that his behavior, his sexual behavior with them, was quote, "I tried to touch them", Unquote. He was quick to add that that was the only offense of that nature or offenses. There was more than one there that he had committed in twenty-two.

Q. He stated that those, the convictions, the two indecent [p. 342] liberties, were the only acts that he committed of that nature in twenty-two years?

A. I can't remember if he also included a third incident that was later dismissed at that same general time. But globally, yes, he wanted to point out that in 1984 was the only time that he had offended in that way in twenty-two years.

Q. Did you ask Mr. Hendricks if he considered himself at the current time to be a pedophile or a pedophile?

A. I'm sure I did.

A. He kind of referred again back to the previous statement about his understanding of a pedophile and said, "Well, the law says I am", then implying that "Since the law says I am, I am."

Q. Did you talk to Mr. Hendricks about whether or not he experienced sexual gratification himself through either erections or ejaculation when he was having sex with these children?

A. He said he sometimes experienced erections. Denied that he ever had ejaculated.

Q. One thing that Mr. Lee had indicated earlier in his testimony was that the DSM-IV indicates one thing that you might look at in the criteria for pedophilia is fantasies of a sexual nature. Did you talk to Mr. Hendricks about whether he had any fantasies involving children?

[p. 343] A. He said he didn't remember having any.

Q. Did you talk to – Strike that. Let me ask you, Doctor, is it your experience in dealing with sex offenders that there are occasions when they engage in behavior that they are not convicted for?

A. Oh, yes.

Q. Did you talk to Mr. Hendricks about that, whether or not there was any other conduct he engaged in with children that was not charged or convicted on?

A. Yes. I asked him directly. That's a very – That's a question often asked – is automatic.

Q. What did Mr. Hendricks say?

A. He said, "Every time I did it, I was caught." If I may go on.

Q. Yes, please.

A. I questioned that and asked him again if that was really the case. And he backed off a little bit and said, "I probably got away with it one or two times. But that was in the 1950's." Again he wanted to mention that he didn't offend at all during the twelve years prior to his conviction in 1984.

Q. Let me just ask you, Doctor, kind of off the path here for just a minute. Did Mr. Hendricks ever indicate to you that he molested his stepdaughter, Rose?

A. No.

[p. 344] Q. Did Mr. Hendricks indicate to you that he had ever molested his stepson, Roger?

A. No.

Q. Thank you very much. Did you ask Mr. Hendricks if he had any certain preferences or if he liked kids in a certain age range or anything like that?

A. I can't remember if I asked him about the age range; but in terms of sex, he began, according to him, mostly with little girls; then later involved both sexes, children in sexual activity with him.

Q. Did he indicate to you how he would engage these children in sexual behavior or what his approach might be towards these children?

A. He conveyed and said that he used a more or less a friendly approach and that if the kids were friendly and cooperative in turn, fine. If they did not respond or in any way indicated that they did not want to participate, then he would not involve them. He would, quote, "take off", unquote.

Q. When you were talking to Mr. Hendricks about this, did you get the impression from what he was saying to you that there had been occasions when he had approached children who had indicated an unwillingness and that he had been – not – that he had then not pursued his advances?

A. Well, he would – "Some would let you and some [p. 345] wouldn't." And he said, "If kids didn't consent, I took off. Why hang around when you are not wanted."

Q. Did you ask the respondent, Mr. Hendricks, if he had ever engaged in sexual intercourse with the children?

A. Yes. And he said he did not.

Q. And what about – Let me ask you if you ever defined sexual intercourse for him such as putting his penis or finger in an oriface, for example, a vagina?

A. I did not ask him that. I felt he knew what sexual intercourse was.

Q. Did you have an opportunity to ask Mr. Hendricks about his first act of molestation towards a child?

A. He reminded me at one point that "That was a long time ago, Doc", and had difficulty remembering. But he then said he thought it was in the fifties, while he was in the military service; and that was a situation of indecent exposure.

Q. Did he tell you if it involved boys or girls or both?

A. At that time, he said it involved girls, little girls.

Q. Did you also talk to him about his conviction in Washington for sodomy and indecent liberties with a child?

A. Yes. We did talk about that. We talked about all the offenses that are – that I had available that were on record. And I think the sodomy conviction –

MR. WEILERT: Your Honor, could we approach

* * *

[p. 350] report to the Court that was sent in, and I'll just direct you to the paragraphs called "Other Information", page 4, at the bottom and then at 5, at the top, is what we're talking about.

THE COURT: Yes, I do have that. I was looking at the original reported date, September 2nd. We don't seem to have a problem then. Can I go ahead and bring the jury back, then?

MR. WEILERT: Yes, sir.

THE COURT: Mrs. Soper.

(At this point the jury returns to the courtroom.)

THE COURT: Ms. Barnett, you may continue your examination.

MS. BARNETT: Thank you, Your Honor.

BY MS. BARNETT:

Q. Dr. Befort, going back to your report, still on page 2, I would just like to ask you before we get back into the specifics of what Mr. Hendricks said to you what other types of documents in general did you have to look at, I believe you mentioned earlier that you looked at some other things?

A. I listed those in the report. You want me to –

Q. Just in general, did you look at police reports in this case?

A. I had police department offense reports for the 1984 [p. 351] incident. I had the State Reception and Diagnostic Center report of April 2 of '85.

Q. And with regard to the State Reception and Diagnostic Center report, did you actually look at it and review it as part of your evaluation process?

A. Yes.

Q. And in looking at that particular report, do you recall if there was any comment in there attributed to Mr. Hendricks about the frequency or regularity of his sexual impulses?

A. Yes.

Q. And did you make any special note of that, or did that seem important to you to consider and everything?

A. Yes. When I was talking to him about offenses or behavioral acts, acts of sex with children for which he was not apprehended, discovered or prosecuted, I just noted that he told the clinician, according to the report in '85, that the KSRDC, that he acted on his sexual impulses, quote, "once per month, twice a month", unquote.

Q. Did you discuss that with Mr. Hendricks when you were talking to him as part of this evaluation?

A. No, I didn't.

Q. All right. Now, I believe we also talked about the – before about your discussing with Mr. Hendricks sexual intercourse. Let me ask you, did you talk to him about engaging in acts of oral sodomy with children and if he had [p. 352] ever done that?

A. Let's see. If he had ever done that? He did say that he tried to have them masturbate him. I don't believe he ever –

Q. If I might –

A. – admitted to –

Q. Go ahead. You don't believe he ever admitted to that?

A. – requiring kids to masturbate him or do oral sex with him.

Q. If I can have you refer on down to the third complete paragraph on page 2 of your report, wouldn't it be fair so [sic] say that he didn't – He didn't have any of the children suck his penis?

A. Okay. Yes, that's right. He specifically denied that.

Q. And, in fact, you talked to him, didn't you, specifically about one of his convictions involving criminal sodomy with the boy, the allegations surrounding oral sodomy and asked him about that?

A. That was, I think, the 1967 case. And he told me that the sodomy conviction resulted from the claim by the boy that he said tried to suck his penis; but Mr. Hendricks denied that that occurred.

Q. In fact, did he tell you the boy wanted to engage in an act of oral sodomy with him?

A. He said the boy wanted him to but that he didn't care to [p. 353] do it.

Q. Thank you. Now, did you ever talk to Mr. Hendricks about whether or not his actions had actually physically harmed any children or harmed any children in any bay [sic]?

A. Yes, I asked him that.

Q. And what did Mr. Hendricks say to you?

A. He said that physically he never harmed a child.

Q. And were you also – Or did you have the opportunity to ask Mr. Hendricks if he knew why he acted out with children or engaged in sexual activity with children?

A. He said initially that he didn't know and that he had tried to get to the bottom of the cause for his behaving in that fashion, even having discussed it with his mother on more than one occasion, and that he had never

found a satisfactory explanation to him as to why he behaved in that manner and had those problems.

Q. In fact, did Mr. Hendricks convey to you that he found sexual activity with children to be a pleasurable experience?

A. Yes, yes, he did.

Q. Now, I believe we talked somewhat about a few of Mr. Hendricks' convictions. Would it be fair to say that you went through all of Mr. Hendricks' convictions with him and discussed the underlying sexual activity with him?

A. Yes. I did have a copy of his – what's called a rap sheet. And he – And he sat down and went over the entire [p. 354] rap sheet; and he pointed out what happened; what his conviction was in each case, where he went, where he didn't go after the convictions and so forth.

Q. When you were looking at this rap sheet or the information you had on the respondent's prior convictions, did you find that there were any inconsistencies, other than those that we've noted, between what he would admit to or what he said about the offenses?

A. See if I heard that right. The rap sheet is very bare. It's very barren. And so he could tell me about those convictions; and what he said was certainly plausible; certainly could be correct.

Q. In the – that you reviewed in this case, though, did you receive information about his specific convictions, say, for example, in Washington and what the underlying sexual activity was?

A. Yes.

Q. And with regard to that information that you received, in comparing it to what Mr. Hendricks told you, did you find that there were inconsistencies between the two?

A. Yes.

Q. Dr. Befort – And let me just ask you this. You've indicated that you talked to the respondent on three separate occasions. Is that correct? One lengthy, two shorter?

A. Yes.

[p. 355] Q. And would it be fair to say that you've had the opportunity on two separate occasions, at least or two separate times, to observe the respondent and his behavior, things of that nature; and I'm talking about just observations, not as far as interviews or anything?

A. Usually when I went onto the ward, it was to talk to him or one of the other fellows I was evaluating. So very cursory, true; and I talked to other staff people.

Q. All right. You discussed with the staff people their observations of Mr. Hendricks?

A. Generally. Mostly I was looking for symptoms; was he displaying any behavior that would indicate other kinds of problems, that type of thing.

Q. And you've indicated that you have reviewed some reports in this case. Would it be fair to say that you reviewed a large volume of reports in this case related to Mr. Hendricks and his past conduct?

A. All together.

Q. Yes.

A. Yeah. Yes. There were quite a few.

Q. And then you've been asked to prepare an evaluation in this case. Is that correct?

A. That's right.

Q. Now, when you were preparing your evaluation, did you take into consideration any plans for Mr. Hendricks' future [p. 356] that maybe he expressed to you? And let me just ask you, did Mr. Hendricks tell you about any plans for his future, what he was going to do once released on parole?

A. If I'm understanding, I asked what he had to suggest or offer in regard to reassuring society that behavior of this sort wouldn't occur again if he were in society. Is that –

Q. Yeah. What did he tell you?

A. I'd like to quote if I can find it.

Q. If you would like, if I could assist you, it would be on Page 3 of your report.

Q. Starting with the third full paragraph?

A. That's not the one I was looking for.

A. He told me that he had to be awae [sic] of his propensity for the rest of his life. I can't find it right now. He said that he would like to go live somewhere where there weren't too many people, which would have a secondary effect of keeping him out of association with many youngsters.

Q. Did he indicate what area this might be or what kinds of location this would be?

A. He referred to mountainous regions, and I think maybe he referred to Virginia or Kentucky. I don't remember specifically.

Q. Did the respondent ever indicate anything to you about a halfway house that he might go live at after he was placed on parole, like Dodge House?

[p. 357] A. Okay. I don't think I have that in my report. I do remember when we discussed parole possibilities Dodge House. I had never been there; but he was kind of cynical, saying that was kind of a silly plan because there's a school nearby; junior high I believe he said. I don't know if that's correct or not.

Q. All right. Thank you. Now, looking at or taking into consideration everything that you reviewed in this case, your personal interviews with the respondent, your conversations about his behavior and everything with the staff at Larned State Hospital, based upon your experience, your training and your education, would you have an opinion as to whether or not the respondent, Leroy Hendricks, is a pedophile?

A. Yes, I have an opinion.

Q. What is that opinion?

A. I believe he is a pedophile.

Q. And with regard to that diagnosis of his condition as being a pedophile, would you have an opinion, based on everything I've said before, as to whether or not

he's likely to engage in predatory acts of sexual violence or sexual activity with children?

A. Yes, I do.

Q. And what is your opinion?

A. My opinion is that he is likely to engage in such behavior if permitted.

[p. 358] Q. And do you base that upon any specific factors that you can enumerate for us? I know we've gone through a lot of stuff here. Anything? You can just pare it down for us, too?

A. One of the – Well, there are several factors I cited and certainly come into play. One has to do with predicting future behavior, period. And it's generally agreed upon, I think, by the clinical community, but also by folks that use common sense, that behavior is a good predictor of future behavior. In other words, we behave in certain ways repeatedly, chances are that's the way we'll behave in the future; not certainly, but probably. And he has a long and admitted history of sexual behavior and sexual acting out with children over over many years. And I feel that that is a strong predictor of future behavior.

Q. Is there anything else that you feel is a strong predictor of future behavior?

A. Another has to do with the nature of the pedophilia disorder itself. It's known from my professional knowledge and experience that pedophiles tend to repeat their behavior, often frequently. And yet given that that is the nature of pedophilia, and since I believe he is a pedophile – that the probability of repeating such behavior goes up.

Q. In putting that in, you know, laypersons' terms, would it be fair to say that maybe one of the reasons pedophiles [p. 359] repeat their behavior is because it is a pleasurable sexual encounter for them?

MR. WEILERT: I object to the leading form.

THE COURT: Well, it is a leading question Sustained.

BY MS. BARNETT:

Q. Do you have any opinion as to why a person who is a pedophile would continue to engage in pedophilic behavior?

A. As to why, I do believe pedophilia is like some other disorder, such as alcoholism; but it's also like sexual behavior in general, whether it's abnormal or not. Let's admit it. Folks don't usually just engage in sex once. It's a behavior that is repeated by most people who engage in sexual behavior; and pedophilic behavior is sexual behavior; and like normal behavior, it tends to be repeated and very often frequently.

Q. All right. Thank you. Were there any other factors that you noted in Mr. Hendricks' life or history that caused you to have some concern about his ability do this again in the future?

A. I listed some more. One of those is that I didn't get a feeling, based upon the information from the historical records as well as what he conveyed to me, that he really appreciated the seriousness of his behavior. He certainly didn't seem to understand his behavior, which never helps in [p. 360] terms of trying to modify that behavior. He certainly hasn't demonstrated he can control

it to my satisfaction and would certainly indicate that those also would add to the argument that he's likely to act out if unsupervised. He has a large victim pool. He has acted out against children who are not known to him or if they are known, very briefly known. They're people outside the family, in the open community. So that would make any child a potential victim. So there are lots of potential victims, which, let's say, incest violator would not have. A pure incest violator would stick to family members or relations. The other is that he – He hasn't had, as far as I can tell, effective treatment for the condition. Back in the sixties, he did go to a hospital; and from what I read, the staff tried for months and months and months to work with him and actually felt they had done pretty well and even recommended he was safe to be at large.

Q. Did you talk to Mr. Hendricks about his treatment at this hospital?

A. Yes, I did.

Q. What did he tell you about it?

A. Essentially – I will go back. He said it was practice to be sent to that hospital if you were convicted of a sexual offense back in '63, and they did have a special treatment program going on at that time for sex offenders. He told me that he went to group sessions there. He described the [p. 361] program as experimental, by the way – I don't know what he meant by that for sure. But he gave the impression that the clients or patients themselves or inmates, if you wish, had a big say in the actual conduct of the therapy sessions. He remembers that the groups didn't deal just with sex offenses

alone but with related matters such as in his case inferiority complex, feelings of inadequacy and some other personality trait he couldn't recall at the time as well as a sexual deviancy. And he did say that or conveyed that and said that sometimes or often the participation by the member was, quote, "Really just an attempt by the group members to stay out of prison", unquote. He said he did not know specifically what the report about treatment effectiveness was, but it must have been favorable, he agreed, because the sentence was commuted or dismissed or something; and he was put back on parole for his previous offense.

Q. Did he indicate to you, then, that at some later point he went back to this same hospital?

A. Right. As we talked, I knew there was another occasion; and he said that he was sent back there after his next offenses in '67. He said that at that time his attitude was pretty negative, because he knew that he was going to be required to serve some time in prison and that he didn't think much of their program, anyway; and that he generally voiced that opinion, even though there was a brief period of [p. 362] time where he said he wanted to try. I did read something that even though the staff felt the prognosis was poor, they did ask for another ninety days to keep trying. Or maybe – I think it was ninety days. And at the end of that time, he was back to saying that he wasn't interested and was released back to court and then sent to prison.

Q. Would it be fair to say, Doctor, that when Mr. Hendricks was telling you about this that he used a little

bit stronger terms than saying he wasn't interested in referring to the program?

A. Yes.

Q. Would you – It may be difficult.

A. Oh, it's not difficult.

Q. Tell the jury what the stronger term was that he used, if you would, please.

A. He said he saw no reason to put up with the hospital's quote, "bullshit", unquote.

Q. Thank you very much, Doctor.

Now, you've gone through a number of risk factors for us that you have considered in reaching your opinion. Are there any others?

A. In terms of treatment, the fact that he did not participate in treatment while he was in prison here in Kansas also would indicate that nothing significant has probably happened to change the propensity or the tendency to [p. 363] act out in that way. I think I mentioned that after I talked to him, even though he says he must be a pedophile because the law defines it that way, never conveyed that he really thought that was necessarily true. When talking about impact on his victims, he usually used a conditional statement, such as, "If it was harmful, I certainly don't want to harm anybody; and I wouldn't do it again if it was indeed harmful", which does not – It's not very convincing that he really appreciates the situation. His – I'll call it self-protective minimization – I don't think is – is good. Now, the situation he was in, it's understandable. But it is my understanding that in order

for a person to increase the probability of avoiding offense in the future, full disclosure, admitting to the full extent of one's feelings, fantasies, urges and behavior is a very important component for effective outcome.

Q. During your conversations with the respondent, let me just ask you, did he ever show any signs of remorse for what he did?

A. Probably as close as he came was when I asked him about re-offense, whether he would commit again. Besides saying no, because he doesn't want to go to prison again, he also did say that if indeed what he did could be harmful, he wouldn't want to do that again.

Q. That was the closest he came to expressing it?

[p. 364] A. Yes.

Q. Were there any other factors that you considered important in making your evaluation and giving your opinion for the –

A. I think those are the main ones.

MS. BARNETT: All right. May I have just a moment, please, Your Honor.

THE COURT: Yes.

BY MS. BARNETT:

Q. One final question, Doctor, if it were made known to you that Mr. Hendricks had testified earlier today and had made the statement when asked about his ability to re-offend or not re-offend, stated that the only way he could guarantee not re-offending was if he was dead, would that reaffirm your belief in his particular

case that he is likely to engage in predatory acts of sexual violence in the future?

A. It would reinforce it.

MS. BARNETT: Thank you very much, Doctor. I have no further questions at this time, Your Honor.

THE COURT: Very well. Cross examination.

MR. WEILERT: Thank you, Your Honor. I wonder if we might take a very brief recess.

THE COURT: Mrs. Soper, we're going to take a short recess. Would you please escort the jury to the jury room.

[p. 365] (Pursuant to the recess, proceedings continue outside the presence of the jury.)

THE COURT: All right. We are all assembled outside the presence of the jury. Any matters to put on the record before we proceed?

MR. WEILERT: No, Your Honor.

MS. BARNETT: No, Your Honor.

THE COURT: I'll ask Mrs. Soper to bring the jury back in. Doctor, would you go ahead and take the stand again, sir.

(At this point the jury returns to the courtroom.)

THE COURT: All right. We're all assembled again.

Mr. Weilert, are you ready for cross examination?

MR. WEILERT: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. WEILERT:

Q. Dr. Befort, I'd like to start off and ask you if in your the experience that you have related to us you have any specialized training in the evaluation of sex offenders?

A. Specialized training?

Q. Yes, sir.

A. I don't think I've had specialized training beyond the [p. 366] years of, you know, workshops and getting my license renewed. There were many occasions when the topic of evaluation and treatment sex offenders were involved. And certainly I've done a lot of evaluations. So by experience, I developed some competency, I believe.

Q. And those evaluations of sex offenders that you have done, have you been supervised in any of those?

A. Originally, when I was getting my license, I was supervised until I became head of the department by another licensed psychologist.

Q. Okay. How many evaluations of sex offenders did you do while you were being supervised?

A. It would have been up to five. I have no way of knowing. I'm sure there were many dozens probably hundreds.

Q. In your evaluation that you did of Mr. Hendricks, you said that you used some historical data

that you had gathered from various sources, the interview with Mr. Hendricks, the MMPI and one other psychological test. And was there anything else that you used?

A. Behavioral observations short time we had. That was indirectly.

Q. Okay. Now, from those sources, did you determine whether Mr. Hendricks was mentally ill?

A. Did I? No, I ruled it out, which means I did not find him to be mentally ill.

[p. 367] Q. When you are doing an evaluation regarding the competency of person – person to stand trial, are you looking primarily at whether or not he understands what's going on around him and whether he can assist in his defense That's the main question to be answered at this time?

A. In a nutshell, yes.

Q. Now, in discussing personality disorder, you didn't diagnose Mr. Hendricks as having any personality disorder, did you?

A. That's right, I did not.

Q. And there are, what, about eight or so in the DSM-IV?

A. Something like that.

Q. He doesn't have any of those?

A. Not that I – not that I think.

Q. And a personality disorder, that is a well-defined concept in the psychological and psychiatric fields, is it not, because of its inclusion in the DSM-IV?

A. Yes, since it's been in the DSM period. There are other versions, also. It's been recognized, and there's been greater reliability and acceptance among the clinical community as to what a personality disorder is.

Q. And in talking about the diagnostic manuals, essentially DSM-IV, now that went into use, I think, about June of this year, did it not?

A. Not in my opinion, it didn't. It still isn't in general [p. 368] usage. It came out, I think, in May. But APA recommended that it be implemented preferably by 1995.

Q. And one of the reasons for the DSM-III-R would have been the one you were using; and the DSM-IV is to give some more objective standards to diagnosis, is it not?

A. That was one of the reasons, yes.

Q. And to get an even greater reliability?

A. Yes.

Q. So that means what you're trying to accomplish or what the APA is trying to accomplish is if you have two psychologists, and they're looking at the same person, and they use the same criteria, they ought to come up with the same diagnosis?

A. Looking at the same data, right.

Q. Okay. Now, that's rather important in the psychiatric and psychological fields, is it not, for evaluation and treatment purposes?

A. Yes.

Q. Okay. The term "mental abnormality", that is not defined anywhere in the DSM-III, 3-R or IV, is it?

A. As far as I know, it's not.

Q. So it would be improper for a psychologist or a psychiatrist to make a diagnosis of a mental abnormality, would it not?

A. In terms of a formal diagnosis, correct.

[p. 369] Q. Yes, sir.

Q. In your experience, would you agree that the causes of a person's behavior in any given circumstance are multi-dimensional?

A. Yeah, behavior is usually multi-determined.

Q. Okay. And that includes such things as the environment in which a person finds themself or the other people around, the mood that he – he or she is in at that time, just any – any number of things, doesn't it?

A. That's right.

Q. In fact, take yourself for an example. If you are presented with an identical situation on two different days, and one day you're in a real happy mood, and one day you're in a kind of a depressed mood, you may well react differently, might you not?

A. That's possible, yes.

Q. You have told us what congenital means, and I think you said that it's hereditary or genetic or biological?

A. Yes.

Q. And acquired is – An acquired condition is one – Well, first of all, what do you mean by "condition"?

A. As I interpreted it for the law, it has to do with the person's makeup psychologically, emotionally, in terms of traits, characteristics, things of that sort.

Q. Okay. But there's no indication in the statute that [p. 370] we're talking about as to what "condition" means, does it, is it?

A. Anyhow, the statute did not take that term out and define it.

Q. And a congenital or acquired condition, then would it also be correct that different people in the psychological or psychiatric fields would interpret those words in the statute differently than yourself?

A. It's possible.

Q. And those interpretations might well be as valid as yours, right?

A. As valid, okay.

Q. Now, can you tell us what emotional pardon me what congenital or acquired condition predisposes behavior at any given point in time?

A. Say that again.

Q. Is there any congenital or acquired condition that in and of itself would predispose behavior at any future point in time?

A. I think so.

Q. And there are? Do you think there are a lot of those?

A. Yes.

Q. And those might well be – Just give me some of the common ones that come to mind.

A. Personality types.

[p. 371] Q. Okay.

A. Personality disorder.

Q. Okay. Now, personality disorder, those are also defined in your field by the DSM-III, 3-R and IV, aren't they?

A. That's right.

Q. The definition of sexually violent predator, you read that, did you not?

A. Yes.

Q. And it says that means any person who who has been convicted or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, right?

A. Yes.

Q. Would you agree, sir, that the terms "likely to" mean more probable than not?

A. Yes.

Q. So that that means there is a greater than 50 percent probability of the person engaging in some behavior in the future?

A. Getting into numbers makes it difficult but if you take the phrase literally, yes.

Q. Okay. Well, the statute – that's what the statute says, isn't it?

A. Right.

[p. 372] Q. So it means that there's a more than 50 percent chance that the person will engage in predatory acts of sexual violence at some point in the future, right?

A. Right. Given the preceding statements, yes.

Q. Okay. Now, we've had occasion to meet one time before, haven't we?

A. Yes.

Q. And that was at a deposition on the 22nd day of September of this year?

A. I think so. Couple of Wednesdays ago, I believe.

Q. If that's what it says, you wouldn't argue with it?

A. Okay.

Q. I wouldn't, either, if it wasn't – you had after that deposition – You had opportunity to review the testimony you gave in that, did you not?

A. Yes.

Q. And you went ahead and signed the deposition without any – making any changes to your testimony?

A. That's right.

Q. During the course of that deposition, did you refer to an article in the University of Puget Sound Law Review by Robert M. Whetstine (sp) M.D.?

A. I'm sure I did.

A. Yes.

Q. Okay. And you recall that in the deposition you said [p. 373] that you had read up to approximately page 612 of that article?

A. Roughly, yes.

Q. Which was an introduction and evaluation portion?

A. Right.

Q. Discussed an introduction and evaluation process?

A. Right.

Q. And you said that you agreed with the comments of the author in those sections?

A. Generally speaking, yes.

Q. In that article, on page 602, the second full paragraph, it says a another danger is that, quote, "mental abnormality, unquote.

MS. BARNETT: I'm going to object, Your Honor, at this time. Maybe we should approach the bench.

THE COURT: All right. You may approach.

(At this point there was an off the record discussion, after which the following:)

MS. BARNETT: I'm going to object on the basis of this, the witness isn't here from wash- or Western State Hospital records and ask the questions based on –

THE COURT: It's a learned treatise.

MR. WEILERT: He said it's an article that he –

[374] THE COURT: Is it recognized psychology?

MS. FOULSTON: There's a statute on that.

(At this point there was an off the record discussion, after which the following:)

BY MR. WEILERT:

Q. Let me rephrase my question, Doctor. In the course of your deposition, I believe you indicated that the mental abnormality being used to say that someone was predisposed to a certain type of behavior was kind of a circular argument, didn't you?

A. A certain kind of behavior. Certain behavior defined the condition and the condition predicted the behavior.

Q. And so that there really isn't a mental abnormality that a person has, unless he has that behavior. Is that right?

A. As I used it to do my evaluation, the way I interpreted the law.

Q. So if would it be correct, then, that the according to your interpretation, the abnormality used to or derived

from the sexual behavior is then used to the determine predisposition of that behavior?

A. I think you said that right.

Q. You've identified for us some, I think what you called risk factors. Is that right?

[p. 375] A. Yes.

Q. Okay. You said that one of them was the – just the nature of pedophilia. Can you tell us of any studies that would indicate what the nature of pedophilia is insofar as determining future behavior?

A. I can't quote any studies right here, and now that's just based on my knowledge.

Q. Do you have any studies which would indicate that a failure to appreciate the seriousness of behavior is an indicator of continued sexual deviant behavior?

A. Again I can't quote a study today. It's an accepted –

Q. Can you point us to any studies or learned treatises which would say that a person not understanding the reason for his behavior is an indication of future re-offense?

A. Again, I can't quote an article or a study. It's just knowledge in the professional community.

Q. Insofar as hospital is – pardon me – Insofar as treatment in a penal institution is concerned, can you show us any study which would indicate that failure to participate in such treatment is an indication that there will be future misconduct?

A. I don't have a study at hand, no.

Q. Do you have any knowledge of any learned treatises or study which would indicate that the failure to understand the impact that a crime of this nature has on a victim has any [p. 376] effect on the re-offense statistics?

A. I don't – again don't know of a study. That's just something I believe is true professionally.

Q. Do you know of any studies or learned treatises which would indicate that a self-protective minimization is an indication of – that there is a greater risk of future re-offense?

A. I think I used the phrase self-protective minimization earlier today in a different context. If it's done in a treatment context, yes, that, in my opinion, is a risk for re-offense.

Q. Do you have any learned treatises or studies which would back up that opinion?

A. Not that I know of right now.

Q. Do you know of any way, Doctor, that you can really tell whether or not someone feels remorse about their prior actions?

A. Can really tell?

Q. Uh-huh.

A. In the way you're implying, probably not.

Q. And I'm sure during your twenty – over twenty years out at Larned, you've probably seen some people who have the words come out of their mouth; but you didn't believe that, right?

A. Yes, sir.

[p. 377] Q. And so the fact that a person doesn't say it really isn't any more an indication of no remorse than a person who says it insincerely. Is that right?

A. They don't mean quite the same thing; but they are going in the right direction, same direction, yes.

Q. And this isn't – pardon me – After your talked with Mr. Hendricks, you said that he did say if it was harmful to his victims, he wouldn't want to cause any more harm. Is that right?

A. That's what he said, yes.

Q. Okay. Do you have any learned treatises or studies which would indicate that the showing of remorse is an indication in any respect of a propensity to re-offfend in the future?

A. I can't quote a study right now. It's just my professional information, knowledge.

Q. Would you agree, Doctor, that predicting the behavior of a person at any point in the future is nearly impossible?

A. Well, for nearly every behavior, I'm sure there's some behaviors you can be correct about.

Q. Now, you are talking about trying to predict behavior years into the future, would you agree that that is impossible?

A. We're talking about behaviors in terms of social choices and social behavior, yes; eliminate the physical behavior. [p. 378] In other words, I think twenty years

from now if I jump off a building, I'm probably going to go down. I probably can't jump a hundred feet in the air. Those you can predict with certainty.

Q. You're talking about the laws of physics; and those types of things, we assume, are going to stay the same?

A. Right.

Q. But as far as human behavior, you can't predict that, can you?

A. With a hundred percent certainty, it's very difficult, no.

Q. Have you ever had occasion to just where you personally have known persons quite – for quite some time; and then at some point in the future, they did something that surprised you because you didn't think that they would do it?

A. Certainly.

Q. And have you had people who you've known for quite some time that you thought in the future probably would do something, and they did it?

A. That's right.

Q. And are those people some that you had had extensive contact with?

A. I would assume so, whether personally or professionally.

Q. So you would agree that predicting with certainty is impossible?

[p. 379] A. In that context, yes.

Q. Now, in your work at Larned, sir, you do quite a few evaluations of persons who are being committed because of mental illness. Is that right?

A. Yes.

Q. Okay. And I want to make it real clear that's not what we're talking about here, is it?

Q. You're not saying Mr. Hendricks is mentally ill?

A. That's right. Mr. Hendricks – If I were evaluating him and asking for an opinion about mental illness, I wouldn't call him mentally ill.

Q. What you deal with in the mentally ill situations are people who because of their immediate past behavior someone feels it's likely that they're going to injure themselves or others. Is that right?

A. Yes.

Q. And in making those evaluations, is it not correct, sir, that you relied very heavily upon recent past behavior?

A. Yes.

Q. And in those evaluations, you're concerned with the problem that would be presented in the immediate future as far as that person's behavior and actions, right?

A. The word – yeah. Defining the word immediate as?

Q. Within a week or two.

A. To predict the future?

[p. 380] Q. Yes, sir.

A. We predict further than that. I mean, as much as a year, but not ten years; not fifteen years.

Q. Not even thirteen months, is it?

A. Typically not.

Q. Now, in those cases, do you know of any learned treatises or studies which show the accuracy of those predictions?

A. There are lots of studies out there. I don't have one at hand or immediately available.

Q. Now, would you agree with me, sir, that it is different to have thoughts or fantasies regarding deviant sexual behavior in the future than actually performing the acts of deviant sexual behavior?

A. Are those different?

Q. Yes?

A. Yes.

Q. I believe you diagnosed Mr. Hendricks as having pedophilia?

A. Yes.

Q. In making that diagnosis, did you have any information of behavior of a pedophilic nature, other than what happened back in 19- – prior to 1984?

A. That's all I had.

Q. And, of course, during that time from 1984 till your [p. 381] evaluation, Mr. Hendricks was in prison?

A. Yes, that's my understanding.

Q. In your evaluation procedure, did you have any information that Mr. Hendricks still was experiencing fantasies, sexual fantasies involving children?

A. Currently, no. No information to indicate that.

Q. Did you have any – pardon me – information regarding whether or not Mr. Hendricks had any sexual urges involving children over the last ten years?

A. No, I had no information in the past ten years that he's had sexual urges.

Q. In fact, didn't he tell you that since about 1989 or so he had no sexual urges of any sort?

A. He said he had not had erections.

Q. Okay. During the time that Mr. Hendricks was incarcerated, are you aware of any behavioral problems that he presented?

A. No significant ones that I know of.

Q. Pardon?

A. No signifcant [sic] ones that I know of.

Q. In fact, I think the only – You received a copy of the report from the Department of Corrections to the District Attorney, did you not?

A. Yes. That was a face sheet.

Q. And I think the only thing mentioned on there was some [p. 382] sort of possession of something he wasn't suppose to have?

A. Something unrelated to the issue at hand.

Q. And admittedly his – given his narrow living quarters, I guess, at the time, and societal setting at the time, you aren't aware of any problems he had in that situation as far as getting along with others and conducting his daily life?

A. As far as I know, it was satisfactory.

Q. Are you of the opinion, sir, that once a diagnosis of pedophilia has been made that that diagnosis stays with the person forever?

A. I'm sure that's not true in every case, but that's my understanding. If I were making it, I would tend to keep it.

Q. And that generally speaking would be regardless of whether or not the person had treatment or not, wouldn't it?

A. Most likely.

Q. And you mentioned alcoholism as maybe something similar, and that's where – Correct me if I'm wrong, but generally it's accepted that alcoholism, once a person is an alcoholic, they stay an alcoholic; but all they do is abstain from drinking?

A. The ones that are successful, yes, I think that's my understanding. I think most of my colleagues would agree.

Q. They aren't called "cured", are they?

A. No, they have a different term there. They're not drinking, anyway.

[p. 383] Q. Right. Abstain. And you would put pedophilia in kind of that same – pedophilia in kind of that same category as something that goes on as far as the diagnosis, but the behavior may be stopped?

A. Right.

Q. So simply by giving a diagnosis of pedophilia, you aren't saying that a person would re-offend in the future, are you?

A. Not by that single factor, no.

Q. Now, in your interpretation of the statute, pedophilia is a mental abnormality, isn't it?

A. Yes.

Q. And whether that interpretation is correct you would agree is open to –

A. – debate.

Q. – debate. You've said that the diagnosis of pedophilia in and of itself is not sufficient to predict future deviant sexual behavior. Is that right?

A. Yes.

Q. The risk factors that you listed, where did you come up with those, if they weren't out of any learned treatise or studies?

A. I hope from people who read all those learned treatises and summaries. I probably read some of them

myself, but they came from a compilation from Washington State professionals.

[p. 384] Q. And basically that was a list of – just a second here – about a page and a half long?

A. Yeah. I mean, maybe not that particular list but it is comparable to the one I used.

Q. Is there any of this risk factor on that list that you could give me an objective measure of how much that increases the risk of re-offense?

A. Where I would give a percentage, no.

Q. Yes. In addition to the risk factors that are some positive indicators about the lack of re-offense, if you will, aren't they there?

A. Yes.

Q. You didn't list any of those in your report, did you?

A. Right, I did not. Not in his case.

Q. Would it be your opinion, sir, that the lack of using – use of force or violence is a positive indicator as far as lessening risk?

A. Yes.

Q. You talked quite a bit about your evaluation or the interview you had during your evaluation. When you began that interview process, did you explain to Mr. Hendricks what the purpose of the interview was?

A. I don't recall if we went through that specifically, but I determined that he knew what the purpose was.

THE COURT: Excuse me, Mr. Weilert. Are you [p. 385] going to be much longer – your cross examination?

MR. WEILERT: Awhile, I think, yes, sir.

THE COURT: Well, I think this would be an appropriate time to take the evening recess. Ladies and gentlemen of the jury, I'm going to recess you. I'm going to request that you come back tomorrow at 9:30. I have several matters set. Please remember your admonitions. And with that I wish you a good evening, and be back tomorrow at 9:30. Thank you very much.

(Pursuant to the evening recess, proceedings continue the following day outside the presence of the jury as follows:)

THE COURT: We are reassembled outside the presence of the jury. At this time I would inquire, does either counsel desire to put anything on the record?

MS. BARNETT: No, Your Honor.

MR. WEILERT: No, Your Honor.

THE COURT: Very well, then. I will ask Mrs. Soper to escort the jury back from the jury room.

Dr. Befort – Is he available? Doctor, would you go ahead and come on back up.

(At this point the jury returns to the courtroom.)

THE COURT: Good morning, ladies and gentlemen [p. 386] of the jury. We are ready to resume in this case.

Mr. Weilert, when we recessed yesterday evening, you were on cross examination of Dr. Befort. If you would continue, sir.

MR. WEILERT: Thank you, Your Honor.

CONTINUED CROSS EXAMINATION

BY MR. WEILERT:

Q. Good morning, Dr. Befort. You are the same Charles Befort who was testifying yesterday, and you understand you're still under oath?

A. Yes.

Q. In going through some of the factors that you said posed a risk of re-offense yesterday, I wonder if we can go through some of those and see if you can give me any kind of quantitative number, a percentage of how much each of these factors increases the risk, if you would?

A. I can say that I won't be able to.

Q. On any of them?

A. No, not a number.

Q. Okay. And can you tell me whether it's a slight risk or a great risk?

A. In some cases, I might be able to do some of that.

Q. Okay. If it's what you would term a great risk, can you put a number on that so – How big of percentage of a risk it is?

[p. 387] A. No.

Q. You indicated, I believe, also that there were some factors that in your opinion would tend to indicate a low risk of re-offense or a lower risk of re-offense?

A. Yes, could lower the argument about re-offense, yes.

Q. Okay. And we talked about one of those being the lack of any physical violence or force. Do you agree with that?

A. Right. If that occurs, it goes up. If it doesn't occur, it goes down.

Q. Okay. And do you agree, sir, that a person accepting responsibility for his actions would decrease this risk of re-offense?

A. Yes.

Q. Would the fact that the person at the time of the acts was alcohol and drug free and continued to be, would that decrease the risk of re-offense?

A. In my opinion, yes.

Q. Would the fact that there was no bizarre or ritualistic behavior, would that decrease the risk of re-offense?

A. Bizarre could be psychotic. Ritualistic could be something else. Ritualistic abuse, if that's absent, certainly that would be in favor of saying a person isn't as great a risk of re-offense as a person who does engage in ritualistic behavior.

Q. And the term "anti-social personality disorder", Miss [p. 388] Barnett asked you some questions about that yesterday?

A. Yes.

Q. Now, you're not saying Mr. Hendricks has that the diagnosis, are you?

A. I do not give him that personality disorder diagnosis.

Q. So the lack of an anti-social diagnosis, that's also a sign that re-offense is less likely, is it not?

A. If he has it, it's worse.

Q. In your profession, Doctor, isn't it correct that you have several scientific journals that provide information about new or even old developments in your profession?

A. Yes.

Q. And would you say it's important to keep up with those journals in order to stay current in your field?

A. Yes.

Q. When we were talking yesterday about alcoholism being at least in some respects similar to pedophilia, that once the person is an alcoholic or is a pedophile, there's not a cure but only control. I think that's what you say.

A. That's my opinion, yes.

Q. Okay. And I think we were trying to come up with the word recovering alcoholic?

A. That was it.

Q. Okay. Now, Doctor, if a recovering alcoholic came up to you and said, "Doctor, I guarantee that I never am going to [p. 389] take another drink", what would you think of that?

A. Depending on the context, if I felt he was sincere, trying to convince himself as well as me, I would see that as a positive sign.

Q. Could it also be interpreted as a negative sign that he wasn't recognizing the nature of his illness?

A. I said, yes; depends on the context, right.

Q. And, in fact, if the person, an alcoholic, came up and said, "I guarantee I'm never going to have another drink", that's really an exaggeration of what he can guarantee, isn't it?

A. It depends on his perspective, his comprehension of the disorder, his motivation.

Q. So when Ms. Foulston asked you yesterday if you took Mr. Hendricks' statement that he couldn't guarantee that he would molest a child, you said you think that shows a risk factor for him to re-offend? Isn't that what you said?

A. With regard to his statement about guarantee?

Q. Uh-huh.

A. I don't remember Mrs. Foulston asking that but –

Q. Or Pardon me – Miss Barnett?

A. Okay. He didn't tell me that, but, again, depending upon context, if he's being realistic, saying, you

know, "I'm gonna try my darndest. It's my intention not to do it again, but I can't guarantee it" – which could imply two things. [p. 390] One, at least he's trying; and the other is he's not sure. So it can go either way.

Q. Mr. Hendricks said that here in the courtroom yesterday on the witness stand, do you think that would be an indication that he was trying to be truthful with the jury?

MS. BARNETT: I'm going to object. Witness cannot comment on credibility of witness. That's for jury to determine.

THE COURT: Sustained.

MR. WEILERT: Did the Court make a ruling?

THE COURT: I sustained the objection.

MR. WEILERT: Thank you. I didn't hear you.

THE COURT: Yes.

BY MR. WEILERT:

Q. Okay. In your testimony yesterday, I believe you expressed an opinion that Mr. Hendricks was a sexually violent predator as defined by the statute?

A. In my opinion, yes.

Q. And realizing that to make that opinion you have to be saying that it is more than 50 percent probable that he will re-offend at some point in the future. Is that what you meant to say by that?

A. That's what we agreed upon yesterday, yes.

Q. And do you have any basis in any research in the psychological or psychiatric fields that would support that [p. 391] opinion?

A. Not that I can quote you today, no.

MR. WEILERT: Don't have anything else. Thank you, Your Honor.

THE COURT: Any redirect?

MS. BARNETT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. BARNETT:

Q. Mr. Weilert yesterday during the beginning of his cross examination talked to you about analogizing alcoholism to child molesting. Let's clarify that just a minute, though, Doctor. If you are an alcoholic and you drink, who ultimately do you hurt?

MR. WEILERT: Objection. Its' argumentative and calls for pure speculation.

THE COURT: Well, I'll sustain the objection at this time.

BY MS. BARNETT:

Q. Doctor, by using alcoholism as a comparison tool here in the courtroom, did you mean to imply that alcoholism has the same ramnifica tions [sic] or effects on other peoples' lives that child's molesting does?

A. Not the same.

Q. All right. Thank you, Doctor. Now, I believe that Mr. Weilert talked to you about using force or violence; and [p. 392] would that be a factor to consider. Would it be a factor to consider if someone threatens a child in order to gain sexual favors from them?

A. Yes.

Q. Would that tend to indicate to you that that's a factor to consider in whether they're likely to re-offend or not?

A. In terms of re-offense and prognosis, yes, it is a factor.

Q. And that would go to prognosis, I believe you said. Is that correct?

A. Right.

Q. Now, I think sometimes when we're talking about child abuse cases, maybe we stereotype the type offenders that are involved in those cases. Has it been your experience that most child molesters are people who beat up their victims to get sex from them or threaten them with weapons in order to gain sexual favors?

A. No, not – not weapons usually or physical force. Certainly those do occur.

Q. But that would not be the majority of the cases, would it, Doctor?

A. In the majority of cases I worked with, there hasn't been in most of the cases – have not involved brutal physical violence.

Q. Have you ever worked with victims of child abuse, [p. 393] Doctor?

A. Yes.

Q. Have you had contact with children in your endeavors as a psychologist?

A. Yes.

Q. Has it been your experience that children are Well, let me ask you, what is your experience with children as far as victims?

MR. WEILERT: I object, Your Honor. It's outside the scope of cross and irrelevant to anything we're dealing with here.

THE COURT: Well, I'm going to sustain the objection at this time as being outside the scope of cross examination.

BY MS. BARNETT:

Q. Doctor, based upon your conversations with Leroy Hendricks and your review of the records you've been provided, have you seen anything that indicates any motivation on his part to change?

A. Any motivation?

Q. Yes.

A. Yes, I've seen some.

Q. What?

A. He is – I believe he would like to stay out of prison. I think that his conditional statements, "If I have

caused [p. 394] harm or would cause harm", there's probably some of his – feeling on his part that he prefer not to hurt kids. He would rather believe that what he does is harmless.

Q. So you're indicating that at least Mr. Hendricks – He would prefer to believe that his behavior with children has not hurt them in any way?

A. He would certainly like to believe that.

Q. Now, you've made the statement that he made a comment he doesn't want to go back to prison. Does someone like Mr. Hendricks indicating that that's part of their motivation not to re-offend, does that show any great insight into their problem or what they need to do to change their behavior?

A. It doesn't warrant against it. If that's the sole or nearly sole reason you want to question he – how strong motive that is. And whether that means insight or not, you're going to have to ask for the questions.

Q. Doctor, again, referring to the other information that you reviewed in making your evaluation of Mr. Hendricks, it was brought to your attention that he had been diagnosed with other personality disorders. Is that true?

A. In the past.

Q. Yes?

A. Yes.

Q. Do you happen to recall what those were?

MR. WEILERT: I object, Your Honor. It's [p. 395] irrelevant. Dr. Befort's made it clear that he doesn't see any other personality disorder in Mr. Hendricks at the present time. Anything past.

THE COURT: I'll overrule.

BY MS. BARNETT:

Q. You may answer, Dr. Befort.

A. According to my report in 1964, let me be very careful here. He was diagnosed as having a psychopathic personality disturbance, sexual deviation. That's one diagnosis.

Q. All right.

A. That diagnosis comes from the first manual, the Diagnostic and Statisticual [sic] Manual, and as far as I can – I didn't use that manual. I came in when the DSM-II was vogue. But I looked that up; and they don't mean the same thing; or they didn't mean the same thing in terms of personality disorder in that regard as we mean today by illegible standards.

Q. But at that time by those standards and by those definitions that was what he was diagnosed with having?

A. If we were still using that manual, yes. That's where you would put it.

Q. All right. Thank you. Now, in your discussions with Mr. Hendricks and your review of his records, would it be fair to say that you saw a progression in his sexual deviancy from let's say exposure to fondling or light touching to oral [p. 396] sodomy, sexual intercourse?

A. That's an example of progression. Now, he admitted to progression but not to that extent. He talked about being a person who exposed himself initially, and then his deviant behavior involved little girls and then eventually both sexes.

Q. When you see a progression of sexual deviancy like that, is that something that you would consider to be a risk factor weighing against someone being at large, where they have a large victim pool, as you said?

A. Progression is fairly common in these kinds of behavioral patterns. If it's not there, that certainly would bode well for prognosis or future behavior if he stays at the level of being an exhibitionist; but if there's evidence he's going on, then you waive [sic] the flag and say – need to stop this.

Q. And, Doctor, let me ask you hypothetically, based upon your past experience and your past training and everything, have you looked at studies and reviewed articles and treatises and things of this nature that deal with discussing the behavior, future behavior, that type of thing?

A. Oh, yes.

Q. And when you were talking to Mr. Weilert about those things, I noticed that you weren't able to cite – and you referred to anything –

[p. 397] A. No, I couldn't cite particular studies.

Q. But you have those things in your background and training, don't you, Doctor?

A. Yes, I consider that I have the knowledge of the average, competent clinician in regard to those things.

Q. When we're talking about statistics, numbers, treatises, studies, things of that nature, let me ask you if in that same vein of things that people use to make determinations if you ever heard of the phrase "common sense"?

A. Sure.

Q. Do you consider yourself to be a person with common sense, Doctor?

A. Yes, I do.

Q. And do you feel that using common sense in your everyday practice as a psychologist is necessary and appropriate?

A. Certainly a part of the things you need to use to do a good job.

Q. In looking at this particular case involving Mr. Hendricks, I realize that your opinions previously stated have been based on your experience, your training, your qualifications; but would it also be fair to say that you used common sense in arriving at your opinions?

A. Yes, I hope I do that automatically.

MS. BARNETT: Thank you very much, Doctor. [p. 398] I have no further questions, Your Honor.

THE COURT: Any further cross examination?

MR. WEILERT: Thank you, Your Honor.

RECROSS EXAMINATION

BY MR. WEILERT:

Q. Doctor, this diagnosis of a sociopathic personality disturbance, sexual deviation in DSM-I. That's generally the same as pedophilia in DSM-IV, is it not?

A. Let me explain. I think the DSM-I – I can look, but I think I can recall correctly there is suppose to be a specification after that last phrase in regard to what area, whether it's exhibitionism, pedophilia. I did not have that on the information. I wrote this report. But, yes, that's – That's where you put sexual deviations.

Q. Okay. So this sociopathic personality disturbance, that was back in what 1963, is the same thing you're saying now is pedophilia?

A. As I understand that manual, yes.

Q. Okay. It's not any other kind of personality disorder, is it?

A. That's right.

Q. It wouldn't fit in any of the categories of personality disorder and DSM-III-R or DSM-IV, would it?

A. Not as I read it.

MR. WEILERT: That's all I have. Thank you.

[p. 399] THE COURT: Any further redirect examination?

MS. BARNETT: Yes, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MS. BARNETT:

Q. Along with that diagnosis, Mr. Hendricks was diagnosed as having passive aggressive personality trait disturbance, wasn't he, Doctor?

A. I think so.

MR. WEILERT: Your Honor, I object. It's outside the scope of the recross examination. Miss Barnett wanted to get into anything else, she had her opportunity.

THE COURT: At this time I'm going to overrule simply because of – Well, I'll overrule.

MS. BARNETT: Your Honor, may I approach and get Exhibit Thirteen, please.

THE COURT: Yes.

BY MS. BARNETT:

Q. Doctor, just for the record and clarification, I've placed in front of you an item marked as Petitioner's Exhibit Number Thirteen. Did I show you that exhibit sticker on the front of that?

A. Yes, you did.

Q. And I referred you to I believe it's the third or fourth page in that packet, dated 1-15-68. Does that assist you at all?

[p. 400] A. Yes, that's correct.

Q. Does that refresh your memory at all about whether Mr. Hendricks –

A. Right, I have it in my report. Also I'm trying to match up the dates. Yes, that's the diagnosis that was given at Western State Hospital.

Q. And that would be a personality disorder, passive-aggressive personality trait?

A. May I check?

Q. Yes, please.

A. There's obviously one in that manual. I think there still is in the DSM-I.

A. I'm ready to try that, I think.

Q. Okay.

A. In the DSM, the initial DSM, which was used up to, I think, the late sixties. They broke things down into two categories regarding personality stuff, one they call personality disorder, which are – kind of fits what we mean today by personality disorder. However, they have a second section, which is called personality trait disturbance, which, as far as I can tell, going through it fairly quickly, is less – well, it looks like they've broken them into two categories and the personality trait disturbance would suggest if – just a moment, please.

Q. Let me just ask you this, Doctor; and I realize you're [p. 401] looking at DSM-I but under the current DSM that you use either III-R or IV, I believe that you said is supposed to be – come into play in 1995. Is there a passive-aggressive personality disorder.

MR. WEILERT: Your Honor, I object first of all to Miss Barnett asking another question about – The doctor has answered the one before.

THE COURT: Well, I'll sustain the objection. Let him try to answer the first question that was propounded, then, we'll go to the next one.

MS. BARNETT: Do you recall my previous question?

A. Yes. I'm going to have to do some studying on this. All I know is they make a distinction; and I get the impression that the personality trait disturbance is, I think, quantitatively a bit different, suggesting a little less permanent. Permanent is not quite the right – strong, – what have you.

Q. But he was still –

A. But under – Yeah, one of the personality trait disturbance – or two of them, rather – One is passive-aggressive personality. And one is sexual deviation. So when you diagnosis someone with personality trait disturbance, you then specify the nature of that disturbance by putting an appendage on the diagnosis. In this case, it [p. 402] looks like they did a complete job or at least reported completely. They did call it a personality trait disturbance, passive-aggressive personality, passive-dependent type with sexual deviation and pedophilia.

MS. BARNETT: Thank you very much.

THE COURT: Mr. Weilert, do you have any –

FURTHER RECROSS EXAMINATION

BY MR. WEILERT:

Q. Dr. Befort, what you just read, that's not comparable to any personality disorder in the DSM-III-R or IV, is it?

A. Not comparable, no.

Q. So for that report back in 1968 you can't sit here now and say that Mr. Hendricks has a personality disorder, can you?

A. Based just on that report, no.

Q. And based on that report and your examination, you've already said that he doesn't, haven't you?

A. In my opinion, that's right.

MR. WEILERT: That's all. Thank you.

THE COURT: You may step down.

THE WITNESS: May I be dismissed?

THE COURT: May he be dismissed?

MS. BARNETT: The State has no objection, Your Honor.

MR. WEILERT: I think he needs to stay, Your

* * *

[p. 410] call Dr. William Logan.

DR. WILLIAM LOGAN

called as a witness, having been first duly sworn, testifies as follows: